

ONTARIO ATTORNEY GENERAL LAW LIBRARY



00067139

Handbook for *POA* Prosecutors

As of Jan. 2012 this is the latest
edition.

Ministry of the Attorney General
POA Transfer Project

KF
9619
O58
2001
c.2

2001

KF
9619
O58
2001
c.2

Ontario. Ministry of the Attorney
General. POA Transfer Project.
Handbook for POA Prosecutors

00067139

Card 5

DATE

ISSUED TO

KF
9619
O58
2001
c.2

Ontario. Ministry of the Attorney
General. POA Transfer Project.
Handbook for POA Prosecutors

MINISTRY OF THE
ATTORNEY GENERAL
LAW LIBRARY


Handbook for *POA Prosecutors*

Copyright © 2001

Ministry of the Attorney General
POA Transfer Project
720 Bay Street, 3rd Floor,
Toronto, ON
M5R 2X8

This Manual is included in the reference materials distributed by the *Provincial Offences Act* Transfer Project, Ministry of the Attorney General for training of new municipal prosecutors and is intended for training purposes only. It is not intended for general distribution.

The contents of this work represent the opinions of its authors and should not be construed as being the policy of government or any other organization. The Ministry of the Attorney General is not liable or responsible for any errors or omissions that might occur. This Manual is not intended to replace legal advice, and if legal advice is required, the services of a competent solicitor should be sought.



Digitized by the Internet Archive
in 2017 with funding from
Ontario Council of University Libraries

https://archive.org/details/mag_00067139

FOREWORD

One of the hallmarks of the *POA* Transfer Project is the tradition of consulting and collaborating with key stakeholders on all major initiatives. In keeping with this tradition, *The Prosecutors' Handbook* was developed with the assistance and support of expert resources from the Ministry of the Attorney General (MAG), the judiciary, the municipal sector, the private bar, and the police.

Marg Wilson, an expert in legal education and former *POA* Training Manager was the guiding light of this endeavor. In developing the legal training strategy and tools for the *POA* transfer, Marg championed the need for this *Handbook* and organized its creation. She also had the foresight to hire **Christopher Webb**, Counsel, the main author of this *Handbook*. Chris' research and writing skills, attention to detail, and dedication to the cause of legal education enabled the *Handbook* to become a reality.

The Project is indebted to our Division, Court Services, and to **Heather Cooper**, our Assistant Deputy Attorney General, for her leadership and support of the Project and its products, including this *Handbook*. **Murray Segal**, Assistant Deputy Attorney General, Criminal Law Division, allowed the divisional experts noted below to give time to this endeavour and also contributed to the printing of the *Handbook*.

The Honourable Associate Chief Justice Marietta L. D. Roberts, Co-ordinator of the Justices of the Peace, and **His Honour Justice Rick Libman**, Ontario Court of Justice, both provided ongoing encouragement to the Project's goals of enhancing the quality of *POA* prosecutions. The *POA* Project is very grateful to Justice Libman for his review of several chapters of the *Handbook* and for his direction and advice on the Appeals chapter. **Her Worship Opal Rosamond**, Senior Advisory Justice of the Peace and the justices of the peace of the "*POA* Rules Committee", which she chairs, also gave generously of their time in reviewing and commenting on various drafts.

The Project is indebted to **Tom Fitzgerald**, Director, Crown Operations, North Region, **Marc Garson**, Director, Crown Operations, West Region, **Scott Hutchison**, Director, Integrated Justice Program & Information Technology, and **Sheilagh Stewart**, Counsel, Divisional Planning and Administration, all from Criminal Law Division, MAG. They generously shared their formidable expertise in this area of the law and reviewed key chapters. Criminal Law Division also contributed the time of Counsels **Phil Downes** and **Christine Tier** who provided additional research and editing skills.

Among the many municipal contributors, special thanks are due to **Paul Condon**, City Solicitor, City of North Bay; **Paul Dray**, Manager, Prosecutions, City of Brampton; **Doug Meehan**, Manager, Prosecutions, City of Mississauga; **Brenda Russell**, Manager of Municipal Law and Court Services, City of Barrie; **Martina Shaw**, Director of Court

Administration, Region of York (who shared an earlier manual she developed); and **Karen McCleave**, formerly with York Region, and now with the Orangeville Crown Attorney's office.

When Marg Wilson took on new challenges, **Jane Hooey**, skilled deliverer of prosecutor training, took on the formidable task of organizing the completion of the *Handbook*, including the final edit, development of the Index, checking case citations, arranging for the French translation, and printing and distribution. She also retained **Steven Boorne**, Solicitor, who wrote Chapter Eight on French Language Service Rights.

Shonda Pierce, Counsel, contributed her excellent writing skills to a complete edit and **Miriam Weinfeld**, Senior Counsel, provided her usual sage advice. Other contributors included **Jason Stinson**, and **Phylis Camposano**, Provincial Prosecutors.

The production of the *Handbook* involved considerable logistical and production challenges. **Linda Fitzgerald** typed the first draft, then **Darrell Major** brought his considerable technical skills to its completion.

The Project would be remiss in not thanking **Gina Cullen**, Manager of Library Services, MAG, for assisting Chris and Shonda and providing them with a quiet refuge.

The main purpose of The *Prosecutors' Handbook* is to ensure that municipal *POA* Prosecutors have a comprehensive ready reference tool to assist them in *POA* court. A secondary outcome was the infectious spirit of cooperation amongst all of the collaborators. This cooperation strengthened prosecution networks in support of the guiding principles of the *POA* transfer contained in the Memorandum of Understanding (and for that, Marg, Chris and Jane emphasize, thanks are due to **all** of the contributors to the *Handbook*.)

Sandra Tychsen, Director,

POA Transfer Project
Court Services Division
March 2001

Table of Contents

Table of Casesxi

1. INTRODUCTION 2

2. PART 1 PROCEEDINGS – DEFENDANT’S
OPTIONS, DEFAULT CONVICTION PROCESS
AND REOPENINGS..... 4

2.1 INTRODUCTION 4

2.2 DEFENDANT’S OPTIONS 5

2.2.1 Defendant’s Options When Served with an Offence Notice..... 5

2.2.2 Plea of Guilty by Paying the Set Fine..... 6

2.2.3 Plea of Guilty with Representations 6

2.2.4 Trial..... 8

2.2.5 Defendant’s Options When Served with Part 1 Summons..... 11

2.3 THE DEFAULT CONVICTION PROCESS 12

2.3.1 Failure to Respond to the Offence Notice..... 12

2.3.2 Failure to Appear at Trial..... 13

2.3.3 Constitutional Validity of Sections 9 and 9.1..... 14

2.4 REOPENINGS..... 19

2.4.1 Introduction..... 19

2.4.2 Reopenings – Section 11 POA..... 20

2.4.3 The Test for Reopening..... 21

2.4.4 Powers of the Justice and Defendant’s
Options Following Reopening..... 22

3. PRE-TRIAL MATTERS 24

3.1 INTRODUCTION 25

3.1.1 Interests of the Victim(s)..... 26

3.1.2 Interests of the Defendant and Protection of the Public..... 26

3.1.3	<i>The Efficient Use of Judicial Resources</i>	27
3.2	CHARGE SCREENING	27
3.2.1	<i>Introduction</i>	27
3.2.2	<i>The Charge Screening Process</i>	28
3.3	DISCLOSURE	30
3.3.1	<i>The Prosecutor's Duty to Disclose</i>	31
3.3.2	<i>What Does Not Have to be Disclosed</i>	32
3.3.3	<i>Benefits of Full Disclosure</i>	32
3.3.4	<i>Disclosure and the Unrepresented Defendant</i>	33
3.4	RESOLUTION DISCUSSIONS (PLEA BARGAINING)	34
3.4.1	<i>Introduction</i>	34
3.4.2	<i>Principles of Resolution Discussions</i>	34
3.4.3	<i>Courtroom Practice Following Resolution Discussions</i>	36
3.5	FIRST ATTENDANCE	37
3.5.1	<i>Introduction</i>	37
3.5.2	<i>Availability of First Attendance Meetings</i>	37
3.5.3	<i>Principles of First Attendance Meetings</i>	39
3.5.4	<i>Matters to Avoid at First Attendance Meetings</i>	40
3.5.5	<i>Courtroom Practice Following First Attendance Meeting</i>	40
4.	THE TRIAL	42
4.1	INTRODUCTION – THE TRIAL PROCESS	43
4.2	PARTIES	45
4.2.1	<i>Introduction – The Adversarial System</i>	45
4.2.2	<i>The Prosecutor</i>	45
4.2.3	<i>Role of Defence Counsel or Agent</i>	46
4.2.4	<i>The Trial Justice</i>	49
4.3	FAULT	56
4.3.1	<i>Fault (Mens Rea) Generally</i>	56
4.3.2	<i>The Nature of Regulatory Offences</i>	57
4.3.3	<i>Strict and Absolute Liability</i>	57

4.3.4	<i>Subjective versus Objective Fault</i>	62
4.4	COMPELLING THE APPEARANCE OF THE DEFENDANT	63
4.4.1	<i>Witnesses</i>	63
4.4.2	<i>The Defendant</i>	64
4.5	ORGANIZING THE DOCKET AND CALLING THE LIST	65
4.5.1	<i>Introduction</i>	65
4.5.2	<i>Organizing the Docket</i>	65
4.5.3	<i>Calling the List</i>	67
4.6	MOTIONS AND APPLICATIONS	68
4.6.1	<i>Introduction</i>	68
4.6.2	<i>Procedural and Evidential Requirements</i>	68
4.6.3	<i>Form and Consent of Notices of</i> <i>Motion / Application and Affidavits in Support</i>	69
4.7	CHALLENGES TO THE CERTIFICATE OF OFFENCE	69
4.8	COURTS AND JURISDICTION.....	70
4.8.1	<i>Territorial Jurisdiction</i>	70
4.8.2	<i>Judicial Jurisdiction</i>	72
4.8.3	<i>Limitation Period</i>	72
4.9	ARRAIGNMENT AND PLEA.....	73
4.9.1	<i>Introduction</i>	73
4.9.2	<i>The Arraignment</i>	74
4.9.3	<i>Plea of Guilty to Offence Charged</i>	74
4.9.4	<i>Plea of Guilty to Another Offence</i>	78
4.9.5	<i>Imposition of Sentence Following Plea of</i> <i>Guilty to Offence Charged or Other Offence</i>	79
4.9.6	<i>Plea of Not Guilty</i>	80
4.9.7	<i>Special Pleas – Autrefois Acquit and Autrefois Convict</i>	80
4.9.8	<i>Issue Estoppel or Res Judicata</i>	82
4.9.9	<i>The Kienapple Principle</i>	83
4.9.10	<i>Order of Dismissal</i>	84
4.10	ADJOURNMENTS.....	85

4.10.1	<i>Generally</i>	85
4.10.2	<i>To Permit Attendance of Defendant's Agent or Counsel</i>	87
4.10.3	<i>To Permit Attendance of the Defendant</i>	88
4.10.4	<i>To Permit Attendance of Witnesses</i>	88
4.10.5	<i>To Permit Attendance of Provincial Offences Officer</i>	90
4.10.6	<i>To Permit Attendance of the Prosecutor</i>	91
4.10.7	<i>To Permit Arrival of Ministry Documents</i>	92
4.10.8	<i>Practice Following Adjournment</i>	93
4.11	EVIDENCE	94
4.11.1	<i>Admissibility – Relevance and Materiality</i>	94
4.11.2	<i>Burden of Proof, Standard of Proof and Presumptions</i>	96
4.11.3	<i>The Voir Dire</i>	107
4.11.4	<i>Direct Evidence and Circumstantial Evidence</i>	109
4.11.5	<i>Formal Admissions</i>	112
4.11.6	<i>Real Evidence</i>	113
4.11.7	<i>Documentary Evidence</i>	115
4.11.8	<i>Hearsay</i>	116
4.11.9	<i>Statements</i>	133
4.11.10	<i>Identity</i>	143
4.11.11	<i>Judicial Notice</i>	147
4.11.12	<i>Opinion Evidence</i>	157
4.11.13	<i>Privilege</i>	165
4.12	EXAMINATION OF WITNESSES	166
4.12.1	<i>Competence and Compellability</i>	166
4.12.2	<i>Prosecutorial Discretion to Call Witnesses</i>	168
4.12.3	<i>Interpreters</i>	171
4.12.4	<i>Exclusion of and Contact with Witnesses</i>	173
4.12.5	<i>Examination in Chief</i>	174
4.12.6	<i>Cross-Examination</i>	180
4.12.7	<i>Re-examination</i>	189
4.12.8	<i>Motion for Non-Suit</i>	189
4.12.9	<i>Reply</i>	190
4.12.10	<i>Re-opening</i>	195

4.13 DEFENCES	199
4.13.1 <i>Generally</i>	199
4.13.2 <i>Excuses and Justifications</i>	200
4.13.3 <i>Necessity</i>	200
4.13.4 <i>Ignorance of the Law</i>	202
4.13.5 <i>Officially Induced Error</i>	203
4.13.6 <i>De Minimis Non Curat Lex</i>	204
5. SENTENCING	205
5.1 INTRODUCTION	206
5.2 THE NATURE OF REGULATORY OFFENCES	206
5.3 THE OBJECTIVES OF SENTENCING	207
5.3.1 <i>Deterrence</i>	207
5.3.2 <i>Rehabilitation and Reformation</i>	209
5.3.3 <i>Retribution and Denunciation</i>	209
5.4 THE PRINCIPLES OF SENTENCING	211
5.4.1 <i>Proportionality</i>	211
5.4.2 <i>Disparity</i>	217
5.4.3 <i>Totality</i>	218
5.5 THE SENTENCING HEARING	220
5.5.1 <i>Submissions</i>	220
5.5.2 <i>Guilty Plea</i>	221
5.5.3 <i>Joint Submissions</i>	222
5.5.4 <i>Proof of Previous Convictions</i>	224
5.6 AVAILABLE PENALTIES	225
5.6.1 <i>Section 12 of the POA</i>	225
5.6.2 <i>Discretion to Impose Fine Below Statutory</i> <i>Minimum or Suspend Sentence</i>	226
5.6.3 <i>Discretion to Impose Fine in Excess of Set Fine</i>	227
6. APPEALS	228
6.1 INTRODUCTION	229

6.2	GENERAL PROVISIONS, PART VII POA.....	230
6.2.1	<i>Definitions</i>	230
6.2.2	<i>In Custody Payments.....</i>	231
6.2.3	<i>Payment of Fine Before Appeal.....</i>	232
6.2.4	<i>Stay Pending Appeal.....</i>	233
6.2.5	<i>Transmittal of Material Relevant to the Appeal</i>	237
6.3	PART I APPEALS	238
6.3.1	<i>Introduction.....</i>	238
6.3.2	<i>Appeals Under Part I.....</i>	238
6.3.3	<i>Conduct of the Appeal – Review.....</i>	244
6.3.4	<i>Powers of the Court on Appeal.....</i>	246
6.3.5	<i>Appeals Based Upon Alleged Defects in the Certificate of Offence</i>	258
6.3.6	<i>Dismissal of Appeals as Abandoned.....</i>	259
6.4	APPEALS TO THE ONTARIO COURT OF APPEAL.....	261
6.4.1	<i>Grounds for Appeal.....</i>	261
6.4.2	<i>Requests for Crown Appeals.....</i>	263
7.	THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS.....	265
7.1	ENFORCEMENT OF RIGHTS	266
7.1.1	<i>Generally.....</i>	266
7.1.2	<i>Notice.....</i>	266
7.1.3	<i>Forum.....</i>	267
7.1.4	<i>Onus</i>	268
7.2	DISCLOSURE	269
7.2.1	<i>Generally.....</i>	269
7.2.2	<i>The Duty to Disclose</i>	269
7.2.3	<i>Police Duty to Disclose.....</i>	271
7.2.4	<i>The Defendant's Right to Disclosure.....</i>	272
7.2.5	<i>Prosecutorial Discretion to Delay or Withhold Disclosure.....</i>	273
7.2.6	<i>Remedies for Non-Disclosure.....</i>	273

**7.3 RIGHT TO BE TRIED WITHIN A REASONABLE
TIME – SECTION 11(B) CHARTER..... 277**

7.3.1 *Generally..... 277*

7.3.2 *The Interests Protected by Section 11(b)..... 278*

7.3.3 *The Test for Unreasonable Delay..... 278*

7.3.4 *Remedy for Unreasonable Delay..... 284*

8. FRENCH LANGUAGE SERVICES RIGHTS 285

8.1 REQUESTS FOR BILINGUAL HEARINGS 286

8.1.1 *Rules for proceedings – the Courts of Justice Act 287*

8.1.2 *Additional Requirements: The French Language Services Act
and Agreements with Municipalities..... 292*

9. GLOSSARY 295

9.1 DEFINITIONS..... 296

9.2 REFERENCE SOURCES..... 307

10. INDEX 308

Table of Cases

- Ares v. Venner*, [1970] S.C.R. 608
- Boucher v. R.* (1954), 110 C.C.C. 263 (S.C.C.)
- Boudreau v. R.* (1949), 94 C.C.C. 1 (S.C.C.)
- Brousseau v. R.*, [1969] 3 C.C.C. 129 (S.C.C.)
- Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 (S.C.C.)
- Browne v. Dunn* (1893), 6 R. 67 (H.L.)
- Cassidy v. R.* (1989), 50 C.C.C. (3d) 193 (S.C.C.)
- Chevrier and Maheux v. The Queen*, (unreported, May 7, 1997), (Ont. Ct. (Prov. Div.))
- Children's Aid Society of Winnipeg v. Brooklands* (1946), 86 C.C.C. 227 (Man. C.A.)
- Colpitts v. R.*, [1966] 1 C.C.C. 146 (S.C.C.)
- Cullen v. R.* (1949), 94 C.C.C. 337 (S.C.C.)
- Czumak v. Etobicoke (City)*, [1994] O.J. No. 2247 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- D'astous v. Baie-Comeau (Ville)* (1992), 74 C.C.C. (3d) 73 (Que. C.A.)
- Deep v Wood* (1983), 143 D.L.R. (3d) 246 (Ont. C.A.)
- Dersch v. Canada (Attorney-General)* (1990), 60 C.C.C. (3d) 132 (S.C.C.)
- Eaton v. Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.)
- Exhibitors Inc. v. Allen* (1989), 70 O.R. (2d) 103 (H.C.)
- Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.)
- Fleming v. Toronto Ry. Co.* (1911), 25 O.L.R. 317 (C.A.)
- Ford v. Hopkins* (1701), 1 Salk. 283, 90 E.R. 964 (K.B.)
- Garton v. Hunter*, [1969] All E.R. 451 at 453 (C.A.)
- Hodge's Case*, [1838] 2 Lewin C.C. 227, 168 E.R. 1136 (Q.B.)
- Johnson v. Lutz*, 253 N.Y. 124 (C.A.) (1930)
- Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.)
- Kavanagh v. The Queen* (1988), 6 M.V.R. (2d) 198 (Sask. Q.B.)
- Kramer v. Forgrave* (1989), 68 O.R. (2d) 414 (H.C.)
- Lake v. R.*, [1969] 2 C.C.C. 224 (S.C.C.)
- Law Society of Upper Canada v. Boldt*, [1997] O.J. No. 955 [unreported] (Ont. C.A.) (in chambers)
- Lemay v. The King* (1951), 102 C.C.C. 1 (S.C.C.)
- MacDonald v. R.* (1976), 29 C.C.C. (2d) 257 (SCC)
- Markadonis v. R.* (1935), 64 C.C.C. 41 (S.C.C.)
- Maves v. Grand Trunk Pacific Ry. Co.* (1913), 6 Atla. L.R. 396 (Alta. C.A.)
- MacMillan Bloedel v. Simpson* (1994), 89 C.C.C. (3d) 217 (B.C. C.A.), aff'd 103 C.C.C. (3d) 225 (S.C.C.)
- Metropolitan Toronto (Municipality) v. Banwait* (1997), 36 O.R. (3d) 232 (Ont. Ct. (Gen. Div.))
- Mezzo v. R.* (1986), 27 C.C.C. (3d) 97 (S.C.C.)
- Morozuk v. R.* (1986), 24 C.C.C. (3d) 257 (S.C.C.)

- National Parole Board v. Mooring* (1996), 104 C.C.C. (3d) 97 (S.C.C.)
- Ontario (Worker's Compensation Board) v. Mandelbaum, Spergel Inc.* (1993),
61 O.A.C. 361, 12 O.R. (3d) 385
- Peters v. Perras* (1909), 42 S.C.R. 244
- R. v. 974649 Ontario Inc.* (1998), 130 C.C.C. (3d) 1 (Ont. C.A.)
- R. v. Aalders* (1993), 82 C.C.C. (3d) 215 (S.C.C.)
- R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.)
- R. v. Adgey* (1973), 13 C.C.C. (2d) 177 (S.C.C.)
- R. v. Agawa* (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)
- R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), aff'd (1997), 119 C.C.C. (3d) 1 (S.C.C.)
- R. v. Alves*, [1994] O.J. No. 966 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Alward* (1977), 32 C.C.C. (2d) 416 (N.B. C.A.), aff'd (1978), 35 C.C.C. (2d) 392 (S.C.C.)
- R. v. Amway Corp.*, [1989] 1 S.C.R. 21
- R. v. Anderson* (1938), 70 C.C.C. 275 (Man. C.A.)
- R. v. Anderson*, [1985] O.J. No. 608 (H.C.) (Q.L.)
- R. v. Antoine* (1984), 40 C.R. (3d) 375 (Que. C.A.)
- R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 (S.C.C.)
- R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.)
- R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.)
- R. v. Atikian* (1990), 62 C.C.C. (3d) 357 (Ont. C.A.)
- R. v. Augustine* (1986), 30 C.C.C. (3d) 542 (N.B. C.A.)
- R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 (Ont. C.A.)
- R. v. B.(C.R.)* (1990), 55 C.C.C. (3d) 1 (S.C.C.)
- R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.)
- R. v. B.(J.J.)* (1992), 75 C.C.C. (3d) 413 (Nfld. C.A.), leave to appeal ref'd 78 C.C.C. (3d) vi (S.C.C.)
- R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.)
- R. v. B.(K.G.)* (1998), 125 C.C.C. (3d) 61 (Ont. C.A.)
- R. v. Babinski*, [1999] O.J. No. 1407 (C.A.) (Q.L.)
- R. v. Bain*, [1992] 1 S.C.R. 91
- R. v. Barker*, [1992] O.J. No. 545 (Gen. Div.) (Q.L.)
- R. v. Baron* (1976), 31 C.C.C. (2d) 525 (Ont. C.A.)
- R. v. Barrette* (1976), 29 C.C.C. (2d) 189 (S.C.C.)
- R. v. Beals* (1993), 126 N.S.R. (2d) 130 (N.S.C.A.)
- R. v. Beare* (1988), 45 C.C.C. (3d) 57, (1988), 667 C.R. (3d) 97 (S.C.C.)
- R. v. Beaulac*, [1999] 1 S.C.R. 768
- R. v. Bedford* (1997), 116 C.C.C. (3d) 95 (S.C.C.)
- R. v. Bednarz* (1961), 130 C.C.C. 398 (Ont. C.A.)
- R. v. Beland* (1987), 36 C.C.C. (3d) 481 (S.C.C.)
- R. v. Bellomo* (1995), 14 M.V.R. (3d) 63 (Ont. Ct. (Prov. Div.))
- R. v. Benlolo*, [1993] O.J. No. 2460 (Ont. C.A.) [unreported] (QL)
- R. v. Bennett* (1991), 64 C.C.C. (3d) 449 (Ont. C.A.), aff'd (1992), 74 C.C.C. (3d) 384n (S.C.C.)

- R. v. Bertoli* (1927), 47 C.C.C. 351 (B.C. C.A.), aff'd (1927), 48 C.C.C. 1118 (S.C.C.)
- R. v. Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.)
- R. v. Biddle* (1995), 96 C.C.C. (3d) 321 (S.C.C.)
- R. v. Bland* (1974), 20 C.C.C. (2d) 332 (Ont. C.A.)
- R. v. Blandizzi* (1998), 37 M.V.R. (3d) 240 (Ont. Ct. (Gen. Div.))
- R. v. Boise Cascade Canada Ltd.* (1991), 14 W.C.B. (2d) 259, [1991] O.J. No. 1831 (Ont. Ct. (Gen. Div.)) (Q.L.)
- R. v. Bossman* (1984), 15 C.C.C. (3d) 251 (Alta. C.A.)
- R. v. Boswell* (1984), 3 All E.R. 353 (C.A.)
- R. v. Boudreau* (1949), 94 C.C.C. 1 (S.C.C.)
- R. v. Bourassa* (1991), 67 C.C.C. (3d) 143 (Que. C.A.)
- R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 (Ont. C.A.)
- R. v. British Columbia Hydro and Power Authority*, [1997] B.C.J. No. 1744 (S.C.) (Q.L.)
- R. v. Brooks* (1986), 28 C.C.C. (3d) 441 (B.C. C.A.)
- R. v. Brophy*, [1986] O.J. No. 1107 (H.C.) (Q.L.)
- R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.), leave to appeal ref'd (1993), 81 C.C.C. (3d) vi (S.C.C.)
- R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.)
- R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.)
- R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.)
- R. v. Burt* (1987), 38 C.C.C. (3d) 299 (Sask. C.A.)
- R. v. Burt*, [1993] O.J. No. 1217 (Ont. Ct. (Gen. Div.)) [unreported] (Q.L.)
- R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.)
- R. v. C.(B.)* (1993), 80 C.C.C. (3d) 467 (Ont. C.A.)
- R. v. C.(M.H.)* (1989), 46 C.C.C. (3d) 142 (B.C.C.A.)
- R. v. C. (R.)* (1992), 81 C.C.C. (3d) 418 (Que. C.A.), aff'd (1993), 81 C.C.C. (3d) 417 (S.C.C.)
- R. v. C.I.P. Inc.* (1989), 71 C.C.C. (3d) 129 (S.C.C.)
- R. v. Cachia* (1974), 17 C.C.C. (2d) 173 (Ont. H.C.)
- R. v. Campbell* (1977), 18 N.S.R. (2d) 547 (N.S. C.A.)
- R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)
- R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.)
- R. v. Caron* (1994), 94 C.C.C. (3d) 466 (Ont. C.A.)
- R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.)
- R. v. Carpenter (No. 2)* (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)
- R. v. Carson* (1983), 4 C.C.C. (3d) 476 (Ont. C.A.)
- R. v. Carvery* (1992), 110 N.S.R. (2d) 350 (N.S.S.C. A.D.)
- R. v. Casey* (1987), 80 N.S.R. (2d) 247 (N.S. C.A.)
- R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)
- R. v. Castellani*, [1970] 4 C.C.C. 287 (S.C.C.)
- R. v. Cataract* (1994), 93 C.C.C. (3d) 483 (Sask. C.A.)
- R. v. Century 21 Ramos Realty Inc.* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.)
- R. v. Chabot* (1980), 55 C.C.C. (2d) 385 (S.C.C.)

R. v. Chambers (1990), 59 C.C.C. (3d) 321 (S.C.C.)
R. v. Chandra (1975), 29 C.C.C. (2d) 570 (B.C. C.A.)
R. v. Chapin (1979), 45 C.C.C. (2d) 333 (S.C.C.)
R. v. Chaplin (1995), 96 C.C.C. (3d) 225 (S.C.C.)
R. v. Charemski (1998), 123 C.C.C. (3d) 225 (S.C.C.)
R. v. Chatterton (10 February 1995), (Ont. Ct. (Prov. Div.)) [unreported]
R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)
R. v. CHEK TV Ltd. (1986), 27 C.C.C. (3d) 380 (B.C. C.A.)
R. v. Chessa, [1983] B.C.J. No. 1201 (C.A.) (Q.L.)
R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.)
R. v. Clark (1983), 7 C.C.C. (3d) 46 (Ont. C.A.)
R. v. Clarkson (1986), 25 C.C.C. (3d) 207 (S.C.C.)
R. v. Closs (1998), 105 O.A.C. 392, (1998), 37 W.C.B. (2d) 157 (Ont.C.A.)
R. v. Coffin (1956), 23 S.C.R. 1 (S.C.C.)
R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)
R. v. Collins and Pelfrey (1993), 79 C.C.C. (3d) 204 (Ont. C.A.)
R. v. Conlon (1990), 1 O.R. (3d) 188 (Ont. C.A.)
R. v. Conway (1989), 49 C.C.C. (3d) 289 (S.C.C.)
R. v. Cook, [1997] 1 S.C.R. 1113, (1997), 114 C.C.C. (3d) 481 (S.C.C.)
R. v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.)
R. v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.)
R. v. Corburn (1982), 66 C.C.C. (2d) 463 (Ont. C.A.)
R. v. Cote (1977), 33 C.C.C. (2d) 353 (S.C.C.)
R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287 (Ont. C.A.)
R. v. Couture (1984), 29 M.V.R. 9 (Ont. C.A.)
R. v. Crawford (6 August 1996), (Ont. Ct. (Prov. Div.)) [unreported]
R. v. Creemer, [1968] 1 C.C.C. 14 (N.S.S.C. A.D.)
R. v. Creighton (1993), 83 C.C.C. (3d) 346 (S.C.C.)
R. v. Guerrier (1998), 127 C.C.C. (3d) 1 (S.C.C.)
R. v. D.(A.) (1990), 37 O.A.C. 267
R. v. D.(G.N.) (1993), 81 C.C.C. (3d) 65 (Ont. C.A.)
R. v. Darlyn (1946), 88 C.C.C. 269 (B.C. C.A.)
R. v. Darville (1956), 116 C.C.C. 113 (S.C.C.)
R. v. Daviault (1994), 93 C.C.C. (3d) 21 (S.C.C.)
R. v. De Clercq, [1969] 1 C.C.C. 197 (S.C.C.)
R. v. Deacon (1947), 89 C.C.C. 1 (S.C.C.)
R. v. Defrancesca (1995), 104 C.C.C. (3d) 189 (Ont. C.A.)
R. v. Demeter (1978), 34 C.C.C. (2d) 137 (S.C.C.)
R. v. Desaulniers (1994), 93 C.C.C. (3d) 371 (Que. C.A.)
R. v. Desjarlais (1987), 50 Man. R. (2d) 1 (C.A.)
R. v. DeSousa (1992), 76 C.C.C. (3d) 124 (S.C.C.)

- R. v. DiIorenzo* (1984), 26 M.V.R. 259 (Ont. C.A.)
- R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.)
- R. v. Dobson* (1985), 19 C.C.C. (3d) 93 (Ont. C.A.)
- R. v. Douglas* (1991), 5 O.R. (3d) 29 (C.A.), aff'd [1993] 1 S.C.R. 893
- R. v. Downey* (1976), 32 C.C.C. (2d) 511 (N.S. C.A.)
- R. v. Downey* (1992), 72 C.C.C. (3d) 1 (S.C.C.)
- R. v. Drake* (1970), 1 C.C.C. (2d) 396 (Sask. Q.B.)
- R. v. Drake* (1996), 142 Nfld. & P.E.I.R. 93 (Nfld. S.C. T.D.)
- R. v. Dubeau* (1993), 80 C.C.C. (3d) 54 (Ont. Ct. (Gen. Div.))
- R. v. Duhamel* (1984), 15 C.C.C. (3d) 491 (S.C.C.)
- R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.)
- R. v. Dunnett* (1990), 62 C.C.C. (3d) 14 (N.B. C.A.)
- R. v. Durette* (1992), 72 C.C.C. (3d) 421 (Ont. C.A.), rev'd 88 C.C.C. (3d) 1 (S.C.C.)
- R. v. Durette* (1992), 72 C.C.C. (3d) 421 (S.C.C.)
- R. v. Durocher* (1963), 41 C.R. 350 (B.C.C.A.)
- R. v. Eden*, [1970] 3 C.C.C. 280 (Ont. C.A.)
- R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont. C.A.), aff'd 104 C.C.C. (3d) 186 (S.C.C.)
- R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.)
- R. v. Elliot* (5 September 1995), (Ont. Ct. (Prov.Div.)) [unreported]
- R. v. Elliott* (1981), 12 M.V.R. 35 (O.C.A.)
- R. v. Elmosri* (1985), 23 C.C.C. (3d) 503 (Ont. C.A.)
- R. v. Emilson*, [1996] O.J. No. 5074 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Erven* (1979), 44 C.C.C. (2d) 76 (S.C.C.)
- R. v. Eton Construction Co.* (1996), 106 C.C.C. (3d) 21 (Ont. C.A.)
- R. v. Evans* (1993), 82 C.C.C. (3d) 338 (S.C.C.)
- R. v. Evans* (1993), 85 C.C.C. (3d) 97 (S.C.C.)
- R. v. Ewanchuk*, [1999] 1 S.C.R. 330
- R. v. Ewert* (1989), 52 C.C.C. (3d) 280 (B.C. C.A.)
- R. v. Fanjoy* (1985), 21 C.C.C. (3d) 312 (S.C.C.)
- R. v. Farinacci* (1994), 88 C.C.C. (3d) 1 (S.C.C.)
- R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.)
- R. v. Fegan* (1993), 80 C.C.C. (3d) 356 (Ont. C.A.)
- R. v. Feldman* (1994), 91 C.C.C. (3d) 256 (B.C. C.A.)
- R. v. Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.)
- R. v. Fitton* (1956), 116 C.C.C. 1 (S.C.C.)
- R. v. Fox*, [1994] O.J. No. 667 (Ont. C.A.) [unreported]
- R. v. Francis* (1996), 22 M.V.R. (3d) 211 (Ont. C.A.)
- R. v. Francisty*, [1997] O.J. No. 2118 (Prov. Div.) (Q.L.)
- R. v. Francois* (1994), 91 C.C.C. (3d) 289 (S.C.C.)
- R. v. Franklin* (1991), 66 C.C.C. (3d) 114 (Ont. C.A.)
- R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), aff'd 47 C.C.C. (2d) 411 (S.C.C.)

- R. v. Fry* (1977), 36 C.C.C. (2d) 396 (Sask. Prov. Mag. Ct.)
- R. v. G.(M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.)
- R. v. G.(S.G.)* (1997), 116 C.C.C. (3d) 193 (S.C.C.)
- R. v. Garcia and Silva*, [1970] 3 C.C.C. 124 (Ont. C.A.)
- R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.)
- R. v. Giagnocavo* (1995), 99 C.C.C. (3d) 383 (Ont. C.A.)
- R. v. Gillis* (1974), 18 C.C.C. (2d) 190 (N.S.C.A.)
- R. v. Gobin* (1993), 85 C.C.C. (3d) 481 (Man. C.A.)
- R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.)
- R. v. Grainger* (1978), 42 C.C.C. (2d) 119 (Ont. C.A.)
- R. v. Grant Paving & Material Ltd.*, [1995] O.J. No. 849 (Ont. C.A.) [unreported]
- R. v. Greening* (1993), 47 M.V.R. (2d) 167 (Ont. Ct. (Prov.Div.))
- R. v. Grimsson* (1997), 100 B.C.A.C. 253
- R. v. Gruener* (1979), 46 C.C.C. (2d) 88 (Ont. C.A.)
- R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 (S.C.C.)
- R. v. Gushue* (1980), 50 C.C.C. (2d) 417 (S.C.C.)
- R. v. Haldenby* (1994), 93 C.C.C. (3d) 249 (Ont. Ct. Prov. Div.))
- R. v. Handson* (1978), 43 C.C.C. (2d) 490 (Ont. C.A.)
- R. v. Harper* (1982) 65 C.C.C. (2d) 193 (S.C.C.)
- R. v. Harrell* (1973), 12 C.C.C. (2d) 480 (Ont. C.A.)
- R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.)
- R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.)
- R. v. Hashem* (1992), 41 M.V.R. (2d) 92 (Alta. Q.B.)
- R. v. Hatherley* (1971), 4 C.C.C. (2d) 242 (Ont. C.A.)
- R. v. Haynes* (1993), 349 A.P.R. 161 (N.S.S.C.), aff'd (1994), 4 M.V.R. (3d) 317 (N.S.C.A.)
- R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.)
- R. v. Hebert*, [1955] S.C.R. 120
- R. v. Hickey* (1976), 30 C.C.C. (2d) 416 (Ont. C.A.)
- R. v. Hilaire*, [1999] O.J. No. 898 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Hill*, [1987] O.J. No. 1935 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (S.C.C.)
- R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.)
- R. v. Holloway* (1987), 48 M.V.R. 270 (Ont. Dist. Ct.)
- R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.)
- R. v. Horvath* (1979), 44 C.C.C. (2d) 385 (S.C.C.)
- R. v. Hovila and Tasanko Trucking Ltd.* (1995), 9 M.V.R. (3d) 95 (Ont. C.A.) (in chambers)
- R. v. Howard* (1989), 48 C.C.C. (3d) 38 (S.C.C.)
- R. v. Hudson* (1985), 34 M.V.R. 168 (Ont. H.C.)
- R. v. Hunt* (1986), 18 O.A.C. 78
- R. v. Hunter* (1985), 23 C.C.C. (3d) 331 (Alta. C.A.)
- R. v. I.(L.R.)* (1993), 86 C.C.C. (3d) 289 (S.C.C.)

- R. v. Ibrahim*, [1914] A.C. 599 (P.C.)
- R. v. Idowu*, [1994] O.J. No. 1590 (Ont. C.A.) [unreported] (Q.L.)
- R. v. Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)
- R. v. J.(F.E.)* (1990), 53 C.C.C. (3d) 64 (Ont. C.A.)
- R. v. Jackson* (1987), 38 C.C.C. (3d) 91 (B.C. C.A.)
- R. v. Jacobson* (1972), 9 C.C.C. (2d) 59 (Ont. C.A.)
- R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.) (in Chambers), aff'd 66 C.C.C. (2d) 576n (Ont. C.A.)
- R. v. Jansen* (1983), 10 W.C.B. 24 (Ont. Co. Ct.)
- R. v. Jay* (1987), 50 M.V.R. 137 (P.E.I. S.C.)
- R. v. Jensen* (1986), 24 C.C.C. (3d) 193 (Ont. H.C.)
- R. v. John* (1985), 23 C.C.C. (3d) 326 (S.C.C.)
- R. v. Johnson* (1972), 13 C.C.C. (2d) 402 (S.C.C.)
- R. v. Johnson* (1973), 11 C.C.C. (2d) 101 (B.C. C.A.)
- R. v. Johnston*, [1970] 4 C.C.C. 64 (Ont. C.A.)
- R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 (S.C.C.)
- R. v. Jurty* (1958), 121 C.C.C. 403 (Ont. C.A.)
- R. v. K.(S.)* (1995), 99 C.C.C. (3d) 376 (Ont. C.A.)
- R. v. Kadishevitz* (1934), 61 C.C.C. 93 (Ont. C.A.)
- R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.)
- R. v. Kavanagh* (1955), 114 C.C.C. 378 (Ont. C.A.)
- R. v. Kearley*, [1992] 2 A.C. 228 (H.L.)
- R. v. Keen* (1996), 29 O.R. (3d) 93 (C.A.)
- R. v. Kennedy* (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.)
- R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.)
- R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.)
- R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.)
- R. v. Kinnie* (1989), 52 C.C.C. (3d) 112 (B.C.C.A.)
- R. v. Konkolus* (1988), 6 M.V.R. (2d) 220 (Alta. C.A.)
- R. v. Koop*, [1958] O.W.N. 394 (Ont. C.A.)
- R. v. Kowall* (1996), 108 C.C.C. (3d) 481 (Ont. C.A.)
- R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1 (S.C.C.)
- R. v. Kozy* (1990), 58 C.C.C. (3d) 500 (Ont. C.A.)
- R. v. Krause* (1986), 29 C.C.C. (3d) 385 (S.C.C.)
- R. v. Krukowski* (1991), 2 O.R. (3d) 155 (Ont.C.A.) (in chambers)
- R. v. Kuldip* (1990), 61 C.C.C. (3d) 385 (S.C.C.)
- R. v. Kyle* (1991), 68 C.C.C. (3d) 286 (Ont. C.A.)
- R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.)
- R. v. Lapointe* (1983), 9 C.C.C. (3d) 366 (Ont. C.A.), aff'd 35 C.C.C. (3d) 366 (S.C.C.)
- R. v. Latimer* (1998), 131 C.C.C. (3d) 191 (Sask. C.A.)
- R. v. Laundry* (1996), 93 O.A.C. 100 (in chambers)
- R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.)

- R. v. Lavery (no.2)* (1979), 47 C.C.C. (2d) 60 (Ont. C.A.)
- R. v. Layte* (1983), 38 C.R.N.S. 342 (Ont. Co. Ct.)
- R. v. Leaney* (1987), 38 C.C.C. (3d) 263 (Alta. C.A.)
- R. v. Lem* (1993), 45 M.V.R. (2d) 322 (Ont. C.A.)
- R. v. Lemieux* (1982), 15 M.V.R. 126 (O.C.A.)
- R. v. Lessard* (1976), 30 C.C.C. (2d) 70 (Ont. C.A.)
- R. v. Levy* (1991), 62 C.C.C. (3d) 97 (Ont. C.A.)
- R. v. Li* (1984), 16 C.C.C. (3d) 382 (Ont. H.C.)
- R. v. Liifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.)
- R. v. Loewen* (1997), 122 C.C.C. (3d) 198 (Man. C.A.)
- R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.)
- R. v. Lucas* (1983), 9 C.C.C. (3d) 71 (Ont. C.A.)
- R. v. Lucier* (1982), 65 C.C.C. (2d) 150 (S.C.C.)
- R. v. Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.)
- R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.)
- R. v. M.(F.S.)* (1996), 111 C.C.C. (3d) 90 (Ont. C.A.)
- R. v. MacDonald* (1976), 29 C.C.C. (2d) 257 (S.C.C.)
- R. v. MacDougall* (1981), 60 C.C.C. (2d) 137 (N.S. C.A.)
- R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 (S.C.C.)
- R. v. MacKinnon* (1992), 72 C.C.C. (3d) 113 (B.C.C. A.)
- R. v. MacLean* (1974), 17 C.C.C. (2d) 84 (N.S. Co. Ct.)
- R. v. Malik*, [1997] O.J. No. 5910 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Maloney* (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.)
- R. v. Maltese* (1997), 100 O.A.C. 234
- R. v. Manhas* (1980), 17 C.R. (3d) 331 (B.C.C.A.), *aff'd* [1980] 1 S.C.R. 591
- R. v. Manhas*, [1980] 1 S.C.R. 591
- R. v. Mardave Construction (1990) Ltd.* (1995), 26 W.C.B. (2d) 295 (Ont. Ct. (Prov. Div.))
- R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.)
- R. v. Marshal* (1961), 129 C.C.C. 232 (S.C.C.)
- R. v. Martinez* (1996), 21 M.V.R. (3d) 106 (Ont. C.A.)
- R. v. McCallen*, [1999] O.J. No. 202 (Ont. C.A.) [unreported] (Q.L.)
- R. v. McCullagh* (1990), 53 C.C.C. (3d) 130 (Ont. C.A.)
- R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.)
- R. v. McGilvary* (May 1, 1981) Ont. H.C. (unreported)
- R. v. McGuire*, [1996] O.J. No. 3832 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.)
- R. v. McKimm*, [1970] 1 C.C.C. 340 (Ont. C.A.)
- R. v. McKitka* (1982), 66 C.C.C. (2d) 164 (B.C. C.A.)
- R. v. Mei*, [1996] O.J. No. 3833 (Prov. Div.) (Q.L.)
- R. v. Melarangi* (1992), 73 C.C.C. (3d) 348 (Ont. Ct. (Gen. Div.))
- R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 (Alta. C.A.)

- R. v. Melnichuk* (1996), 104 C.C.C. (3d) 160 (Ont. C.A.), rev'd (1997), 114 C.C.C. (3d) 503 (S.C.C.)
- R. v. Michaud* (1995), 98 C.C.C. (3d) 121 (N.B. C.A.), aff'd (1986), 107 C.C.C. (3d) 193 (S.C.C.)
- R. v. Mihailovic*, [1998] O.J. No. 1801 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.)
- R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont. C.A.)
- R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.)
- R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.)
- R. v. Monroe*, [1998] O.J. No. 1872 (Ont. C.A.) (Q.L.)
- R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.)
- R. v. Moore* (1988), 41 C.C.C. (3d) 289 (S.C.C.)
- R. v. Morgentaler* (1973), 14 C.C.C. (2d) 453 (Que. Q.B.)
- R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.)
- R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.)
- R. v. Morin* (1995), 101 C.C.C. (3d) 124 (Sask. C.A.)
- R. v. Morris* (1983), 7 C.C.C. (3d) 97 (S.C.C.)
- R. v. Morris* (1994), 5 M.V.R. (3d) 110 (B.C. S.C.)
- R. v. Morrisette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.), leave to appeal ref'd (1970) 1 C.C.C. (2d) 299 (S.C.C.)
- R. v. Múgford* (1990), 58 C.C.C. (3d) 172 (Nfld. C.A.)
- R. v. Murray* (1983), 22 M.V.R. 66 (Ont. H.C.)
- R. v. Murray* (1986), 176 A.P.R. 155 (N.S. C.A.)
- R. v. Naraindeen* (1990), 75 O.R. (2d) 120 (Ont. C.A.)
- R. v. Nastos* (1995), 95 C.C.C. (3d) 121 (Ont. C.A.)
- R. v. NBIP Forest Products Inc.* (1994), 146 N.B.R. (2d) 276 (Q.B.)
- R. v. Nicholson* (1984), 12 C.C.C. (3d) 228 (Alta. C.A.)
- R. v. Nickel City Transport (Sudbury) Limited* (1993), 82 C.C.C. (3d) 541 (Ont. C.A.)
- R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.)
- R. v. O'Brien* (1978), 35 C.C.C. (2d) 209 (S.C.C.)
- R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)
- R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.)
- R. v. Orijj*, [1996] O.J. No. 4315 (Ont. Ct. (Gen. Div.)) [unreported] (Q.L.)
- R. v. Overdiek* (1982), 8 W.C.B. 464 (B.C. C.A.)
- R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417 (S.C.C.)
- R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 (Ont. C.A.)
- R. v. P.(G.F.)* (1994), 89 C.C.C. (3d) 176 (Ont. C.A.)
- R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 (S.C.C.)
- R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.)
- R. v. P. (C.S.)* (1995), 98 C.C.C. (3d) 463 (N.S. C.A.)
- R. v. Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.)
- R. v. Panchal*, [1995] O.J. No. 3149 (Ont. Ct. (Prov. Div.)) (Q.L.), (1995), 17 M.V.R. (3d) 60
- R. v. Paonessa and Paquette* (1982), 66 C.C.C. (2d) 300 (Ont. C.A.)
- R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.)

- R. v. Parks* (1992), 75 C.C.C. (3d) 287 (S.C.C.)
- R. v. Parnell* (1995), 98 C.C.C. (3d) 83 (Ont. C.A.)
- R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.)
- R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.), rev'd 110 C.C.C. (3d) 382 (S.C.C.)
- R. v. Paul* (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)
- R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.)
- R. v. Pentiluk and MacDonald* (1975), 28 C.R.N.S. 324 (Ont. C.A.)
- R. v. Perka* (1984), 14 C.C.C. (3d) 385 (S.C.C.)
- R. v. Perry* (1977), 36 C.C.C. (2d) 209 (Ont. C.A.)
- R. v. Petersen* (1982), 69 C.C.C. (2d) 385 (S.C.C.)
- R. v. Pham*, [1996] O.J. No. 4366 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- R. v. Pham*, [1995] O.J. No. 2239 (Ont. Ct. Prov. Div.) (Q.L.)
- R. v. Phyipenko*, [1996] O.J. No. 1944 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- R. v. Pilipovic* (1996), 23 M.V.R. (3d) 282, [1996], O.J. No. 3139 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Pizzardi* (1994), 17 O.R. (3d) 623 (C.A.)
- R. v. Pontes* (1995), 100 C.C.C. (3d) 353 (S.C.C.)
- R. v. Potter* (1982), 17 M.V.R. 54 (Ont. H.C.)
- R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.)
- R. v. Potvin* (1993), 83 C.C.C. (3d) 97 (S.C.C.)
- R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.)
- R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.)
- R. v. Prince*, [1986] 2 S.C.R. 480
- R. v. Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.)
- R. v. Provincial Foods Inc.* (1992), 15 W.C.B. (2d) 227 (N.S. Co. Ct.)
- R. v. Purcell* (1975), 24 C.C.C. (2d) 139 (N.S. C.A.)
- R. v. Queen's University at Kingston* (1997), 25 C.E.L.R. (N.S.) 310 (Ont. Ct. (Prov. Div.))
- R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)
- R. v. Quesnel and Smith* (1984), 14 C.C.C. (3d) 254 (Ont. C.A.)
- R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.)
- R. v. R.(D.)* (1996), 107 C.C.C. (3d) 289 (S.C.C.)
- R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.)
- R. v. Rajaeeford* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.)
- R. v. Richard* (1996) 110 C.C.C. (3d) 385 (S.C.C.)
- R. v. Richardson* (1992), 74 C.C.C. (3d) 15 (Ont. C.A.)
- R. v. Riddle* (1979), 48 C.C.C. (2d) 365 (S.C.C.)
- R. v. Roadhouse* (1934), 61 C.C.C. 191 (B.C. C.A.)
- R. v. Robertson* (1983), 9 C.C.C. (3d) 404 (C.M.A.C.)
- R. v. Robertson* (1984), 43 C.R. (3d) 39 (Ont. Prov. Ct.)
- R. v. Robillard* (1978), 41 C.C.C. (2d) 1 (S.C.C.)
- R. v. Rocca*, [1993] O.J. No. 3221 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.)
- R. v. Rogers (No. 1)* (1972), 6 C.C.C. (2d) 97 (P.E.I. S.C.)

- R. v. Romanowicz* (1998), 14 C.R. (5th) 100 (Ont. Gen. Div.)¹
- R. v. Romanowicz* (1999), 26 C.R. (5th) 246 (Ont. C.A.)
- R. v. Ross* (1985), 14 W.C.B. 437 (Sask. Prov. Ct.)
- R. v. Rose* (1995), 140 N.S.R. (2d) 151 (N.S. S.C.)
- R. v. Rose* (1998), 129 C.C.C. (3d) 449 (S.C.C.)
- R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.)
- R. v. Rowbotham* (1977), 2 C.R. (3d) 293 (Ont. Co. Ct.)
- R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)
- R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 (Ont. C.A.)
- R. v. Rufiange*, [1965] 2 C.C.C. 37 (Que. Q.B.)
- R. v. Russell* (1994) 95 C.C.C. (3d) 190 (Ont. C.A.)
- R. v. Ryan* (1985), 31 M.V.R. 210 (Ont. H.C.)
- R. v. S.(W.)* (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), leave to appeal ref'd 93 C.C.C. (3d) vi (S.C.C.)
- R. v. S.(W.D.)* (1994), 93 C.C.C. (3d) 1 (S.C.C.)
- R. v. Samaras* (1972), 16 C.R.N.S. 1 (Ont. C.A.)
- R. v. Santos* (1993), 67 O.A.C.270 (Ont. C.A.)
- R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.)
- R. v. Savion* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.)
- R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 (Alta. C.A.)
- R. v. Schaffner* (1988), 44 C.C.C. (3d) 507 (N.S. C.A.)
- R. v. Schneiderman*, [1984] O.J. No. 310 (H.C. (Q.L.))
- R. v. Schofield* (1996), 148 N.S.R. (2d) 175 (C.A.)
- R. v. Schwartz* (1978), 40 C.C.C. (2d) 161 (N.S. C.A.)
- R. v. Schwartzbauer* (1935), 64 C.C.C. 1 (S.C.C.)
- R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.)
- R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.)
- R. v. Sears* (1978), 39 C.C.C. (2d) 199 (Ont. C.A.)
- R. v. Selhi* (1990), 53 C.C.C. (3d) 576 (S.C.C.)
- R. v. Sherry* (1995), 103 C.C.C. (3d) 276 (Ont. C.A.), rev'd on other grounds (1996), 110 C.C.C. (3d) 160 (S.C.C.)
- R. v. Sherry* (1996), 110 C.C.C. (3d) 160 (S.C.C.)
- R. v. Shears* (July 4, 1997), Doc. 4440/97 (Ont. Gen. Div.)
- R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.)
- R. v. Shubley* (1990), 52 C.C.C. (3d) 481 (S.C.C.)
- R. v. Shute* (1982), 66 C.C.C. (2d) 354 (N.S.S.C. A.D)
- R. v. Smith*, [1974] O.J. No. 221 (Ont. C.A.) (Q.L.)
- R. v. Smith* (1989), 52 C.C.C. (3d) 90 (Ont. C.A.)
- R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.)
- R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.)
- R. v. Smith* (1993), 50 M.V.R. (2d) 307 (B.C.C.A.)
- R. v. Smith* (1997), 35 W.C.B. (2d) 203 (Ont. Ct. (Prov. Div.)) (Q.L.)

- R. v. Smug*, [1998] O.J. No. 4357 (Ont. C.A.) (Q.L.)
- R. v. Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.)
- R. v. Snider* (1977), 37 C.C.C. (2d) 189 (Ont. C.A.)
- R. v. Speid* (1985), 20 C.C.C. (3d) 534 (Ont. C.A.)
- R. v. Spiller*, [1969] 4 C.C.C. 211 (B.C.C.A.)
- R. v. Stapleton*, [1982] 66 C.C.C. (2d) 231 (Ont. C.A.)
- R. v. Steam Tanker "Evgenia Chandris"* (1976), 27 C.C.C. (2d) 241 (S.C.C.)
- R. v. Stein* (1974), 15 C.C.C. (2d) 376 (Ont. C.A.)
- R. v. Stephenson* (1984), 13 C.C.C. (3d) 112 (Ont. C.A.)
- R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.)
- R. v. Stinchcombe (No. 2)* (1995) 96 C.C.C. (3d) 318 (S.C.C.)
- R. v. Streu* (1989), 48 C.C.C. (3d) 321 (S.C.C.)
- R. v. Sunila and Solayman (No. 2)* (1986) 26 C.C.C. (3d) 462 (N.S.S.C. T.D.)
- R. v. Sunoco Inc.* (1986), 11 C.P.R. (3d) 572 (Ont. C.A.)
- R. v. Sussex Justices, Ex. p. McCarthy*, [1924] 1 K.B. 256
- R. v. Sweryda* (1987), 34 C.C.C. (3d) 325 (Alta. C.A.)
- R. v. Sztuke* (1993), 87 C.C.C. (3d) 50 (Ont. C.A.)
- R. v. T.(L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.)
- R. v. T.(R.)* (1992), 10 O.R. (3d) 514 (Ont. C.A.)
- R. v. T.(V.)* (1992), 71 C.C.C. (3d) 32 (S.C.C.)
- R. v. Tahirkheli* (1998), 130 C.C.C. (3d) 19 (Ont. C.A.)
- R. v. Taillefer* (1978), 42 C.C.C. (2d) 282 (Ont. C.A.)
- R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.)
- R. v. Tateham* (1982), 70 C.C.C. (2d) 565 (B.C. C.A.)
- R. v. Taubler* (1987), 20 O.A.C. 64
- R. v. Taylor* (1995), 142 N.S.R. (2d) 382 (N.S. C.A.), leave to appeal denied [1998], S.C.C.A. No. 186 (Q.L.)
- R. v. Tecoglas, Inc. v. Domglas, Inc.* (1985), 51 O.R. (2d) 196 (H.C.)
- R. v. Terceira* (1998), 123 C.C.C. (3d) 1 (Ont. C.A.)
- R. v. Terry* (1996), 106 C.C.C. (3d) 508 (S.C.C.)
- R. v. Theroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.)
- R. v. Todish* (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)
- R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.)
- R. v. Town* (1998), 125 C.C.C. (3d) 177 (Ont. C.A.)
- R. v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.)
- R. v. Triumbari* (1988), 29 O.A.C. 326
- R. v. Triumbari* (1988), 42 C.C.C. (3d) 481 (Ont. C.A.)
- R. v. Truong* (1992), 27 W.A.C. 124 (B.C. C.A.)
- R. v. Tucker* (1992), 9 O.R. (3d) 291 (C.A.)
- R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)
- R. v. Turmel* (1996), 109 C.C.C. (3d) 162 (Ont. C.A.)
- R. v. U.(F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.)

- R. v. Underwood* (1998), 121 C.C. C. (3d) 117 (S.C.C.)
- R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 (S.C.C.)
- R. v. Valentini* (1999), 43 O.R. (3d) 178; [1999] O.J. No. 251 (Ont. C.A.) (Q.L.)
- R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), leave to appeal ref'd 26 C.C.C. (3d) 207n (S.C.C.)
- R. v. Van Dongen* (1975), 26 C.C.C. (2d) 22 (B.C. C.A.)
- R. v. Vanbots Construction Corp.* (1996), 30 W.C.B. (2d) 47, [1996] O.J. No. 347 (Ont. Ct. (Prov. Div.))
- R. v. Vandale* (1974), 21 C.C.C. (2d) 250 (Ont. C.A.)
- R. v. Vandenberghe* (1995), 96 C.C.C. (3d) 371 (Ont. C.A.)
- R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.)
- R. v. Viger* (1958), 122 C.C.C. 159 (Ont. C.A.)
- R. v. Violetis* (1997), 37 W.C.B. (2d) 472, [1997] O.J. No. 5491 (Ont. Ct. (Prov. Div.)) (Q.L.)
- R. v. Vljakovic* (1994), 5 M.V.R. (3d) 219 (Ont. C.A.)
- R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C. C.A.)
- R. v. W.(A.)* (1994), 94 C.C.C. (3d) 441 (Ont. C.A.), rev'd (1995), 102 C.C.C. (3d) 96 (S.C.C.)
- R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.)
- R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.)
- R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.)
- R. v. Wallace* (1973), 11 C.C.C. (2d) 95 (Ont. C.A.)
- R. v. Walls* (1986), 47 M.V.R. 92 (B.C. Co. Ct.)
- R. v. Ward* (1979), 44 C.C.C. (2d) 498 (S.C.C.)
- R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.)
- R. v. Warner* (1994), 94 C.C.C. (3d) 540 (Ont. C.A.)
- R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.)
- R. v. Webster* (1981), 10 M.V.R. 310 (Ont. Dist. Ct.)
- R. v. Weir*, [1994] O.J. No. 2102 (C.A.) (Q.L.)
- R. v. Welch*, [1993] O.J. No. 3394 (Ont. Ct.(Gen. Div.)) (Q.L.)
- R. v. West* (1982), 35 O.R. (2d) 179 (Ont. H.C.)
- R. v. White* (1947), 89 C.C.C. 148 (S.C.C.)
- R. v. White* (1996), 108 C.C.C. (3d) 1 (Ont. C.A.)
- R. v. White* (1998), 125 C.C.C. (3d) 385 (S.C.C.)
- R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417
- R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.)
- R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.)
- R. v. Whyte* (1988), 42 C.C.C. (3d) 97 (S.C.C.)
- R. v. Wicksted* (1996), 106 C.C.C. (3d) 385 (Ont. C.A.), aff'd (1997), 113 C.C.C. (3d) 318 (S.C.C.)
- R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 (S.C.C.)
- R. v. Wildman* (1984), 14 C.C.C. (3d) 321 (S.C.C.)
- R. v. Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.)
- R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.)
- R. v. Williamson*, [1987] O.J. No. 365 (H.C.)
- R. v. Wilmott* (1967), 1 C.C.C. 171 (Ont. C.A.)

- R. v. Wilson* (1994), 87 C.C.C. (3d) 115 (Ont. C.A.)
- R. v. Wisniewski* (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.)
- R. v. Witter* (1996), 105 C.C.C. (3d) 44 (Ont. C.A.)
- R. v. Wood* (1988), 43 C.C.C. (3d) 570 (Ont. C.A.)
- R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193 (Ont. C.A.)
- R. v. Yebes* (1987), 36 C.C.C. (3d) 417 (S.C.C.)
- R. v. Zakarow* (1990), 74 O.R. (2d) 621 (Ont.C.A.) (in chambers)
- R. v. Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.)
- Ramsden v. Peterborough (City)* (1991), 85 D.L.R. (4th) 76 (Ont. C.A.)
- Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 24 D.L.R. (4th) 536 (S.C.C.)
- Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. C.A.)
- Setak v. Burroughs* (1977), 15 O.R. (2d) 750 (H.C.)
- Slavutych v. Baker*, [1976] 1 S.C.R. 254
- Slough Estates Canada Ltd. v. Federal Pioneer Ltd.* (1994), 20 O.R. (3d) 429 (Gen. Div.)
- Smythe v. The Queen* (1971), 3 C.C.C.(2d) 366 (S.C.C.)
- Street v. Guelph (City)*, [1965] 2 C.C.C. 215 (Ont. H.C.J.)
- Subramanian v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.)
- Sunbeam Corp. v. R.*, [1969] 2 C.C.C. 189 (S.C.C.)
- Toronto (Municipality) v. Miller* (1994), 20 C.R.R. (2d) 81, (Ont. Ct. (Prov.Div.))
- United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424 (S.C.C.)
- United States v. Myers*, 550 F.2d 1036 (5th Cir., 1977)
- Vezeau v. R.* (1976), 28 C.C.C. (2d) 81 (S.C.C.)
- Wawanesa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.)
- White v. The King* (1947), 89 C.C.C. 148 (S.C.C.)
- Woods et al. v. Elias et al.* (1978), 21 O.R. (2d) 840 (Co. Ct.)
- Woolmington v. D.P.P.*, [1935] A.C. 463 (H.L.)

Chapter One

INTRODUCTION

1. INTRODUCTION

In June 1998, the *Provincial Offences Act* was amended to create the statutory authority for a municipality to enter into an agreement with the Attorney General for the performance of court administration, court support and selected prosecutorial functions.

The Transfer Agreement entered into by the municipalities and the Attorney General provides that the Attorney General will continue to be responsible for the integrity of the administration of justice. This manual was prepared to fulfill the commitment made by the Attorney General to provide training and create resources to facilitate the transfer of justice functions. The manual is intended to serve as a guide for municipal prosecutors to ensure the continued integrity of the administration of justice and to enable the municipalities to ensure adherence to the prosecutorial standards established in the Transfer Agreement.

Chapter Two

PART 1 PROCEEDINGS – DEFENDANT’S OPTIONS, DEFAULT CONVICTION PROCESS and REOPENINGS

2. PART 1 PROCEEDINGS – DEFENDANT'S OPTIONS, DEFAULT CONVICTION PROCESS AND REOPENINGS

2.1 Introduction

There are three ways to commence proceedings under the *Provincial Offences Act*. Under Part I, proceedings are commenced by the issuance and filing of a certificate of offence.¹ Parking infraction proceedings are governed by Part II, and are commenced by the issuance of a certificate of parking infraction and parking infraction notice.² Part III proceedings, which resemble the summary conviction procedure used for the prosecution of criminal offences, are commenced by the laying of an information.³

Proceedings in relation to any provincial offence, except for parking infractions, may be commenced under either Part I or Part III.⁴ However, the Part I procedure is intended to be used for the prosecution of less serious offences and can only be used where a set fine has been established for the offence. The maximum penalty that may be imposed in Part I proceedings is \$500.00, and imprisonment is not an available penalty.⁵ Consequently, any offence that carries a minimum fine greater than \$500 or a minimum penalty of imprisonment, may not be commenced by certificate.

The charging document under Part I is the certificate of offence. A certificate of offence may be issued by a provincial offences officer who, upon belief that an offence has been committed, completes a certificate of offence and either an offence notice or a summons.⁶ Pursuant to section 3(1), proceedings under Part I of the *POA* are commenced by filing the certificate of offence in the local court office. The certificate of offence must be filed "as soon as practicable" after service of the offence notice or summons upon the defendant.⁷

The offence notice or summons is the document served upon the defendant, and provides the defendant with notice that he or she has been charged with an offence prosecuted under the *POA*. The certificate of offence, and the offence notice and/or summons are

1 Subsections 3(1) and (2) *POA*

2 Subsection 15(1) *POA*.

3 Subsection 21(1) *POA*.

4 Subsection 21(1) *POA*. Note that parking infraction proceedings may also be commenced under Part III.

5 Subsection 12(1) *POA*.

6 Subsection 3(2) *POA*.

7 Section 4 *POA*. Pursuant to R.R.O. Reg. 200, Rule 11, the clerk of the court shall not accept the certificate of offence for filing more than seven days after service of the offence notice or summons.

pre-printed forms contained in a bound booklet. When the provincial offences officer completes the certificate of offence, the information written on the certificate of offence carbon copies onto the offence notice or summons. The officer then serves the offence notice or summons upon the defendant.

The offence notice or summons must be served upon the defendant within thirty days of the alleged offence date.⁸ In the majority of Part I proceedings, however, the provincial offences officer will serve the defendant with the offence notice or summons on the date of the offence.

2.2 Defendant's Options

Defendants charged with an offence under Part I of the *POA* may be served with either an offence notice or summons to notify him or her that he or she has been charged with an offence.⁹ The document served upon the defendant determines the options available to the defendant.

2.2.1 Defendant's Options When Served with an Offence Notice

Provincial offences officers serve defendants with offence notices¹⁰ in the vast majority of cases commenced under Part I. The offence notice procedure may only be used where there is a set fine established for an offence.¹¹

A defendant served with an offence notice has three options as to how the matter will proceed. These options, which are contained on the back of the offence notice, must be exercised within 15 days of service of the offence notice. The defendant's options are:

- plead guilty by paying the set fine;
- plead guilty with explanation; or
- plead not guilty and request a trial.

8 Section 3(3)

9 Subsection 3(2)

10 The form for an offence notice is prescribed by R.R.O. 1990 Reg. 950, section 2. An offence notice in non-designated areas of the province for the purpose of section 5 of the *POA* shall be in Form 3. An offence notice in designated areas of the province for the purposes of section 5.1 of the *POA* shall be in Form 4.

11 Section 3(2)(a); *R v. Nickel City Transport (Sudbury) Ltd.* (1993), 82 C.C.C. (3d) 541 (Ont. C.A.). The amount of the set fine for an offence for the purpose of Part I proceedings is determined by the Chief Justice of the Superior Court of Justice (R.R.O. 1990, Reg. 200 Rule 6).

2.2.2 Plea of Guilty by Paying the Set Fine

The first option contained on the back of the offence notice is to plead guilty by paying the set fine. This option is established by section 8 of the *POA*, which provides:

8. (1) Payment out of court – Where an offence notice is served on a defendant who does not wish to dispute the charge, the defendant may sign the guilty plea on the offence notice and deliver the offence notice and amount of the set fine to the office of the court specified in the notice.

(2) Conviction – Acceptance by the court office of payment under subsection (1) constitutes a plea of guilty whether or not the plea is signed and endorsement of payment on the certificate of offence constitutes the conviction and imposition of a fine in the amount of the set fine for the offence.

Section 8 allows a defendant served with an offence notice who does not wish to dispute the charge to plead guilty by signing and completing the guilty plea portion provided on the back of the offence notice and delivering it with full payment of the set fine to the court office specified on the offence notice. Section 8(2) provides that payment of the set fine constitutes a plea of guilty whether or not the plea, as contained on the back of the offence notice, is signed.

It is possible for a defendant to pay the set fine before proceedings have been commenced against him or her. This is because a provincial offences officer has seven days after the day on which the offence notice was served to file the certificate of offence.¹² In these circumstances, the fine payment is held in abeyance until the certificate of offence is filed. If the certificate of offence is not filed within seven days, or within an extension of time, the money paid by the defendant will be refunded.¹³

2.2.3 Plea of Guilty with Representations

The second option available to defendants served with an offence notice is to plead guilty with an explanation. This option is provided by section 7 of the *POA*:

7. (1) Plea of guilty with representations – Where an offence notice is served on a defendant who does not wish to dispute the charge but wishes to make submissions as to penalty, including the extension of time for payment, the defendant may attend at the time and place specified in the notice and may appear before a justice sitting in court for the purpose of pleading guilty to the offence and making submissions as to penalty, and the justice may enter a conviction and

¹² R.R.O. 1990, Reg. 200 Rule 11.

¹³ R.R.O. 1990, Reg. 200 Rule 19.

impose the set fine or such lesser fine as is permitted by law.

(2) Submissions under oath – The justice may require submissions under subsection (1) to be made under oath, orally or by affidavit.

Section 7 permits a defendant who does not wish to dispute the charge to attend at the court office specified in the notice to plead guilty and make submissions regarding the sentence, including a possible extension of time for payment. The plea will be taken by a justice sitting in court or an office constituted as a courtroom for the purpose of taking a guilty plea. The justice has the discretion to enter a conviction and impose the set fine, reduce the fine, and/or extend the time for payment.

The effect of a guilty plea was discussed in *R. v. Adgey*:

A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without a trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge.¹⁴

The defendant's guilty plea must be unequivocal. The comments of the defendant or the circumstances of the offence as related by the defendant during the course of submissions may cast a doubt upon the validity of the guilty plea. If so, the justice may expunge the guilty plea, and enter a plea of not guilty.¹⁵ This may be done at any time before the imposition of sentence. After sentence is imposed, the justice is *functus officio*.¹⁶

A defendant acting under section 7 can not plead guilty to an offence other than the offence charged. Under section 7, the justice does not have jurisdiction to accept a plea of guilty to any offence other than the one the defendant is charged with. Section 45(4) provides that a plea of guilty to an offence other than the offence charged requires the consent of the prosecutor. As a prosecutor will not ordinarily be present when a defendant exercises his or her option to plead guilty with an explanation, a defendant who wishes to plead guilty to a separate offence must exercise his or her right to trial under section 5 or 5.1.¹⁷

Nor does a justice have jurisdiction to quash a proceeding or amend a certificate of offence in the event of defects or errors on the face of the certificate of offence when a

¹⁴ *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 183 (S.C.C.).

¹⁵ *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 189 (S.C.C.).

¹⁶ *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 (Ont. C.A.); *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.).

¹⁷ Note that in designated areas a defendant who files a notice of intention to appear can request a first attendance meeting. Refer to Section 3.5 of the manual.

defendant proceeds under section 7.¹⁸ If the justice is of the opinion that the certificate of offence is so defective on its face that it cannot be cured under the broad amendment or curative provisions contained in sections 33, 34, 35, or 36 of the *POA*, the justice shall refuse to accept the defendant's guilty plea and advise the defendant of his or her right to request a trial.¹⁹

The *Rules of the Ontario Court of Justice in Provincial Offences Proceedings*²⁰ also make provision for defendants who appear before a justice to enter a guilty plea prior to the certificate of offence being filed in the court office. Rule 17²¹ permits a justice to receive the guilty plea and submissions regarding sentence, and to impose a fine and time to pay in the event that the certificate of offence is subsequently filed. If the certificate of offence is not filed within seven days of service of the offence notice, the defendant will be refunded any money paid to the court office and no conviction will be registered.²²

2.2.4 Trial

The third option contained on the back of the offence notice is the trial option. Sections 5 and 5.1 of the *POA* make the option of a trial available to defendants.

5. (1) Intention to appear – A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by so indicating on the offence notice and delivering the notice to the court office specified in it.

(2) Notice of trial – Where an offence notice is received under subsection (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial.

5.1 (1) Attendance to file notice – This section applies in such parts of Ontario as are designated by regulation.

(2) Section 5 inapplicable – Section 5 does not apply where this section applies.

(3) Filing – A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by attending in person or by agent at the court office specified in the offence notice at the time or times specified in the offence notice and filing a notice of intention to appear with the clerk of the court.

18 R.R.O. 1990, Reg. 200 Rule 16.

19 R.R.O. 1990, Reg. 200 Rule 18.

20 R.R.O. 1990, Reg. 200.

21 R.R.O. 1990, Reg. 200.

22 R.R.O. 1990, Reg. 200 Rule 19.

(4) Form of notice – A notice of intention to appear shall be in the form prescribed under section 13.

(5) Trial – If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial.

Both sections 5 and 5.1 allow defendants served with an offence notice to file a notice of intention to appear in court for the purpose of entering a plea of not guilty and having a trial. Sections 5 and 5.1 represent a compromise between the goal of quickly and efficiently resolving minor regulatory offences on the one hand, and preserving a defendant's right to a fair trial on the other.

The significant distinction between sections 5 and 5.1 is that, pursuant to section 5.1, defendants charged with an offence returnable to a court office located in a designated area of the province must attend in person or by agent to file a notice of intention to appear.²³ The notice of intention to appear in designated areas is a separate document from the offence notice. This procedure contrasts with the procedure applicable to defendants charged with an offence returnable to a court office in a non-designated area. Defendants in non-designated areas may file a notice of intention to appear by signing option 3 contained on the back of the offence notice and delivering the notice to the court office in person or by mail.

Upon receipt of the completed notice of intention to appear, the clerk of the court will set a trial date. The clerk will then inform the defendant and the prosecutor of the time and place for trial.²⁴ Notice of the time and place for trial must be given to both parties at least seven days before the trial date.²⁵

If the notice of intention to appear is received by the clerk of the court before the certificate of offence is filed,²⁶ the offence notice is held in abeyance until the certificate of offence is received. A trial date will be set and notice given upon subsequent receipt of the certificate of offence. However, if the notice of intention to appear has been received and

23 Pursuant to R.R.O. 1990, Reg. 950 section 4.5, the parts of Ontario designated for the purposes of section 5.1 are: County of Northumberland; County of Peterborough; Municipality of Metropolitan Toronto; Regional Municipality of Halton; Regional Municipality of Peel; Township of Bircroft in the County of Haliburton; Township of Cardiff in the County of Haliburton, and That part of the King's Highway known as No. 115 in the Township of Manvers in the County of Victoria.

24 Subsections 5(2) and 5.1(5), POA.

25 R.R.O. 1990, Reg. 200, Subrule 13(3).

26 A provincial offences officer has up to seven days to file a completed certificate of offence. Pursuant to section 4, the certificate of offence shall be filed "as soon as is practicable" after service of the offence notice, while R.R.O. 1990, Reg. 200 Rule 11 provides that the clerk of the court will not accept a certificate of offence for filing more than seven days after service of the offence notice.

the certificate of offence has not been filed within the seven-day period allowed, no trial date will be set without an order extending the time for filing the certificate of offence.²⁷

a. Challenge to Officer's Evidence

Pursuant to section 5.2, a defendant who gives notice of intention to appear must indicate on the notice of intention to appear whether he or she intends to challenge the evidence of the provincial offences officer. Section 5.2 provides:

5.2 (1) Challenge to officer's evidence – A defendant who gives notice of an intention to appear in court for the purpose of entering a plea and having a trial of the matter shall indicate on the notice of intention to appear or offence notice if the defendant intends to challenge the evidence of the provincial offences officer.

(2) Notifying officer – If the defendant indicates an intention to challenge the officer's evidence, the clerk of the court shall notify the officer.

The defendant indicates an intention to challenge the evidence of the provincial offences officer by completing the space provided on the notice of intention to appear. The offence notice warns the defendant that, if the defendant does not wish to challenge the officer's evidence, the provincial offences officer may not attend the trial, and the prosecutor may rely on section 48.1 of the *POA* to introduce certificate evidence against the defendant. If the defendant wishes to challenge the officer's evidence, the clerk of the court will notify the officer of the time and place of trial.²⁸

Note, however, that although the clerk of the court must notify the provincial offences officer of the time and place of trial, the absence of the provincial offences officer on the trial date does not result in an automatic dismissal of the charge. Consistent with the prosecutor's absolute discretion regarding which witnesses will be called as part of the prosecution case,²⁹ the prosecutor need only call those witnesses who are essential to meeting the prosecutor's burden of proving the offence against the defendant.³⁰ However, in the majority of cases, the evidence of the officer will be essential to the prosecutor's case.

Accordingly, section 5.2 does not impose an absolute requirement that the provincial offences officer be called as a witness in all prosecutions. In *R. v. Panchal*, the effect of the non-attendance of the provincial offences officer where the defendant has completed a

²⁷ R.R.O. 1990, Reg. 200 Rule 11.

²⁸ Subsection 5.2(2).

²⁹ *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.).

³⁰ *R. v. Yebo* (1987), 36 C.C.C. (3d) 417 at 433-434 (S.C.C.). See also *R. v. Panchal* (1995), 17 M.V.R. (3d) 60 (Ont. Ct. (Prov. Div.)), where the learned trial justice erred in dismissing the charge against the defendant due to the absence of the provincial offences officer.

notice of intention pursuant to section 5.2 was considered. If the officer does not attend the hearing despite having been notified of the defendant's intention, the court should conduct an inquiry into the value of the officer to the defendant, either as a witness or for the purpose of disclosure. The focus should be on whether the defendant has suffered any prejudice as a result of the officer's non-attendance. If there is no "ascertainable value" to the defendant by having the officer in person in the building, no prejudice has been established, then that would end the matter.³¹ If there is prejudice in any amount arising out of the non-attendance of the officer, then a range of remedies might be considered. Depending upon the level of prejudice occasioned to the defendant due to the absence of the provincial offences officer, the appropriate remedy may include an adjournment or a stay.³²

b. The Trial Date

On the day set for trial, the defendant will be arraigned and asked to enter a plea to the charge.³³ The defendant may enter a plea of guilty to the offence charged,³⁴ or to any other offence with the consent of the prosecutor.³⁵ Alternatively, if the defendant pleads not guilty³⁶ or refuses to enter a plea,³⁷ a trial will be held.

If the defendant, or agent or counsel acting on behalf of the defendant, does not appear on the time and date set for trial, a conviction may be entered in his or her absence under the default conviction procedure provided by section 9.1.

2.2.5 Defendant's Options When Served with Part 1 Summons

Where no set fine has been established for an offence, a defendant will be served with a Part I summons.³⁸ Additionally, the summons procedure may be used where the provincial offences officer believes that the circumstances of the offence are serious enough to warrant the defendant having to attend court.

A defendant served with a Part I summons cannot exercise any of the out-of-court options provided to defendants served with an offence notice. A Part I summons simply indicates a time and date for the defendant to attend court. At the defendant's first appearance, the

31 *R. v. Chatterton* (10 February 1995), (Ont. Ct. (Prov. Div.)) [unreported]

32 Section 45, POA

33 Section 45, POA

34 Subsection 45(2), POA

35 Subsection 45(4), POA

36 Subsection 46(1), POA

37 Subsection 45(3), POA

38 Subsection 3(2), POA

defendant may plead guilty and make submissions as to sentence, or plead not guilty and have a trial.

2.3 The Default Conviction Process

Defendants who fail to exercise any of the options contained on the back of the offence notice, or fail to appear on the date set for trial, expose themselves to the possibility of being deemed not to dispute the charge and having a conviction entered against them in their absence. The failing to appear and deemed not to dispute provisions of the *POA* are sections 9 and 9.1, respectively.

2.3.1 Failure to Respond to the Offence Notice

Section 9 of the *POA* provides:

9. (1) Failure to respond to offence notice – Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,

(a) where the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or

(b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding.

(2) Where conviction without proof of by-law – Where a defendant is deemed to not wish to dispute a charge under subsection (1) in respect of an offence under a by-law of a municipality, the justice shall enter a conviction under clause (1)(a) without proof of the by-law that creates the offence if the certificate of offence is complete and regular on its face.

Pursuant to section 9, where at least 15 days have elapsed since the defendant was served with the offence notice and the defendant has not:

- indicated an intention to dispute the charge without appearing pursuant to section 6;
- signed the plea of guilty on the offence notice and paid the set fine pursuant to section 8; or

- entered a plea of guilty with representations pursuant to section 7,

the defendant *shall* be deemed not to dispute the charge. The certificates of offence charging defendants who have been deemed not to dispute the charge are put on the "fail to respond docket" to be examined by a trial justice.

Once the defendant has been deemed not to dispute the charge, two results may follow. Either a conviction will be entered and the set fine imposed in the defendant's absence, or the proceedings will be quashed. Entry of a conviction and imposition of set fine, will occur where the trial justice, upon an examination of the certificate of offence, finds that the certificate of offence is complete and regular on its face.³⁹

Where, however, the trial justice finds that the certificate of offence is not complete and regular on its face, the trial justice shall quash the proceeding.⁴⁰ If the proceeding is quashed, the trial justice endorses on the certificate of offence the decision and the reasons in support,⁴¹ and, also completes a separate report of the decision and supporting reasons.⁴²

It is important to note that a trial justice acting under section 9 does not have the jurisdiction to amend a defective certificate of offence. In particular, the powers of amendment provided in sections 33, 34, 35 and 36 of the Act do not apply to default conviction proceedings. This is clear from the language of section 9(1)(b), which directs that the justice shall quash the certificate of offence where the certificate of offence is not complete and regular on its face.

2.3.2 Failure to Appear at Trial

Defendants who, after having completed a notice of intention to appear for the purposes of entering a plea and having a trial of the matter, fail to appear at the time and place set for trial, shall be deemed not to dispute the charge and may have a conviction entered against them without a hearing. Section 9.1 of the *POA* provides:

9.1 (1) Failure to appear at trial – If a defendant who has given notice of an intention to appear fails to appear at the time and place appointed for the hearing, the defendant shall be deemed not to dispute the charge.

(2) Examination by justice – If subsection (1) applies, section 54 does not apply, and a justice shall examine the certificate of offence and shall without a hearing

39 Subsection 9(1)(a), *POA*.

40 Subsection 9(1)(b), *POA*.

41 R.R.O. 1990, Reg. 200, subrule 22(1.1).

42 R.R.O. 1990, Reg. 200, subrule 22(3).

enter a conviction in the defendant's absence and impose the set fine for the offence if the certificate is complete and regular on its face.

(3) Quashing proceeding – The justice shall quash the proceeding if he or she is not able to enter a conviction.

Pursuant to section 9.1(1), a defendant who fails to appear at the time and place appointed for trial in Part I proceedings will be deemed not to dispute the charge. It should be noted that section 9.1(1) will only apply where the defendant was served with an offence notice and not a summons. If the defendant was served with a summons the procedure set out in section 54 must be followed.

The procedure which follows a finding of deemed not to dispute under section 9.1(1) mirrors the procedure under section 9. After the defendant has been deemed not to dispute the charge, the presiding justice examines the certificate of offence. If the certificate of offence is not complete and regular on its face, the proceeding shall be quashed.

However, if the certificate of offence is complete and regular on its face, a conviction will be entered and set fine imposed without a hearing.⁴³ In particular, there is no need to conduct an *ex parte* trial when proceeding under section 9.1.⁴⁴

Moreover, the prosecutor need not be ready to proceed with the trial in order for a conviction to be entered under section 9.1 where the certificate of offence is complete and regular on its face. The language of section 9.1 is imperative: a conviction *shall* be entered where the certificate of offence is complete and regular on its face. Therefore, there is no room for an inquiry into whether the provincial offences officer who issued the certificate of offence was present, or any other witness for that matter, before a conviction for the defendant's failure to appear at trial will be entered.⁴⁵

2.3.3 Constitutional Validity of Sections 9 and 9.1

Both sections 9 and 9.1 permit a conviction to be entered against a defendant without a hearing. *Prima facie*, the default conviction process is contrary to the right to be presumed innocent and the right to a fair trial, both of which are guaranteed by section 11(d) of the *Charter*.⁴⁶ However, the default conviction process is saved by section 1 of the *Charter*, as it constitutes a reasonable limit upon a defendant's section 11(d) rights which can be demonstrably justified in a free and democratic society.

43 Subsection 9.1(2), POA.

44 Subsection 9.1(2), POA which provides that section 54 does not apply to proceedings under section 9.1.

45 *R. v. Volebs* (1997), 37 W.C.B. (2d) 472 (Ont. Ct. (Prov. Div.)); [1997] O.J. No. 5491 (Q.L.).

46 *R. v. Carson* (1983), 4 C.C.C. (3d) 476 (Ont. C.A.), *R. v. Pilipovic* (1996), 23 M.V.R. (3d) 282 (Ont. Ct. (Prov. Div.)).

The constitutional validity of section 9 was considered in *R. v. Carson*. Section 9 permits a default conviction to be entered against a defendant who, after being served with an offence notice, fails to exercise any of the three options contained on the back of the notice within the 15 day period prescribed by the *POA*. Brooke J.A., speaking for the court, held that, although section 9 of the *POA* offended section 11(d) of the *Charter* it was saved by section 1.

In our opinion, one cannot determine the constitutional validity of s. 9 of the Provincial Offences Act by regarding it in isolation but, rather, it must be considered having regard to the scheme of the legislation of which it forms an important part. Section 9 is found in Part I, which establishes a simple expeditious procedure for dealing fairly with provincial offences and imposes a limitation as to penalty. This is as opposed to the procedures under Part III of the Act by way of information and summons in which case a greater penalty may be attracted. The procedure under Part I was intended to alleviate inconvenience, cost and hardship to those charged with offences under provincial Acts. It was also intended to remedy an over-taxed court system which was very costly to the people of the province. Under the scheme of Part I the person charged may complete the offence notice and deliver it, specifying, from the available options, how his case is to proceed. As indicated above, he may plead guilty and pay a fine that is fixed without having to go to court. He may also plead guilty with an explanation and simply appear at a court office at a convenient time to explain the situation to the person in authority. Finally, he may plead not guilty, in which case there is a trial. However, the scheme imposes a time-limit within which the person must act as requested. If he does not act, and that is his choice, the section provides and the notice states, "you will be deemed not to wish to dispute the charge, and a Justice shall enter a conviction in your absence." We think that this approach is both fair and logical in the circumstances.

Prima facie, s. 9 of the Provincial Offences Act does not contemplate the disposition of a charge in accordance with all of the elements of s. 11(d) of the Canadian Charter of Rights and Freedoms. For example, there is no requirement of a public hearing when the trial justice considers the sufficiency of the certificate of offence in order to determine whether to convict or to quash the proceeding. The issue then is whether or not the province may impose the limitations in s. 9 of the Provincial Offences Act upon the rights guaranteed by s. 11(d) of the Charter. The rights guaranteed are, by s. 1 of the Charter, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Having regard to the type and class of offences, the number of such cases, the reasons for the legislation, the options given to the person charged as to the

disposition of his case and the provisions of ss. 11 and 118 to avoid any miscarriage of justice, we are satisfied that s. 9 of the Provincial Offences Act, in its context and its effect, is a reasonable limitation such as is contemplated by s. 1 of the Charter.⁴⁷

The constitutional validity of section 9.1, which permits a default conviction to be entered where a defendant fails to appear for trial, was challenged in *R. v. Pilipovic*. As was the case in *Carson*, the defendant/appellant argued that section 9.1 violated the right to be presumed innocent until proven guilty in a fair trial. The Crown respondent argued that it was the conduct of the defendant in failing to appear, not the legislation, which denied the defendant a fair hearing, and consequently section 9.1 did not violate section 11(d) of the *Charter*.

The court, relying on *Carson*, held that section 9.1 constitutes a *prima facie* breach of section 11(d) but was saved by section 1 of the *Charter*. The objective of the legislation was sufficiently important to limit a constitutionally protected right, the legislation was rationally connected to the objective identified, the legislation infringed the right as little as possible and the deleterious effects of the legislation were proportionate given its objective.

The court specifically rejected the appellant's argument that the sole objective of section 9.1 is administrative convenience.

Having considered all the background material I find that I am satisfied on the balance of probabilities that The *Provincial Offences Statute Law Amendment Act* (1993) *supra*, in general, including section 9.1, should be seen as part of an ongoing experiment by the government of this Province to provide an efficient and yet fair method of processing those charged with the less serious order of regulatory offences.

Although the balance struck under section 9.1 may be different than that struck under section 9 it can be said that the objects of the two sections are in many regards analogous. In fact section 9.1 can be seen as an effort to address weaknesses in the original *Provincial Offences Act* model while continuing to achieve the same overall ends.

There is no doubt that in part this legislation is aimed at cost saving and administrative efficiency. I accept that efficiency has never been nor ought to become the primary factor for government to be concerned with in relation to the administration of justice. There is also no doubt that post *Charter*, there are

47 *R. v. Carson* (1983), 4 C.C.C. (3d) 476 at 479-480 (Ont. C.A.).

contexts in which it is now for the judiciary to dictate to government what the capacity of the justice system ought to be. On the other hand, one cannot deny that justice is not being properly administered nor the rule of law well served, if there is not some ongoing effort to utilize public resources well and to protect the justice system from real or potential abuse. I would add that this is particularly the case in the context of a system that deals in the volume and nature of offences associated with the cases before me.

Having examined all the material available to me in this case I am satisfied that the elimination of *ex-parte* trials will result in a real reduction in case load in not only in avoiding the need to having to conduct the *ex-parte* trial but also in eliminating the incentive to file requests for a trial in the hope that through administrative error, illness or other duties the investigating officers or other witnesses might not appear and a dismissal might result. This reduction of caseload can only assist in the concentration of resources on those defendants who truly desire to have a trial by permitting their cases to be reached in a more timely way. In addition, these provisions can be seen as a means of freeing police and court resources to permit their refocusing on other pressing and substantial matters. This overall approach can also, when the surrounding safeguards are considered, be appropriately characterized as an effort to enhance the public's confidence in and respect for the administration of justice in that it renders the system less prone to abuse to the detriment of other members of society.

The reasons of the Supreme Court of Canada in *R. v. Richard* support the holding in *R. v. Pilipovic* that the POA default conviction process violates section 11(d) of the *Charter*, but is saved by section 1. Although decided prior to *Pilipovic*, the reasons in *Richard* had not been delivered at the time *Pilipovic* was heard. In *Richard*, the Supreme Court of Canada considered the constitutional validity of the default conviction process contained in New Brunswick's *Provincial Offences Procedures Act*,⁴⁸ which is similar to sections 9 and 9.1 of the POA. In finding that the New Brunswick provisions did not violate section 11(d) of the *Charter*, LaForest J. speaking for the court said the following:

In my view, an accused who fails both to pay the fine indicated in the ticket and to appear in court at the time and place stated therein waives the benefit of s. 11(d) of the *Charter*, and therefore the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", in the same way as if he or she had, for example, decided to plead guilty. Although at common law, the silence of the accused is equivalent to a plea of not guilty rather than to one of guilty and therefore in a criminal context ss. 7 and 11(d)

48 S.N.B. 1987, c. P-22.1.

might require any waiver to be made only upon appearance (a question on which I express no opinion), it is entirely different in the context of regulatory offences for which imprisonment is not a possibility and which accordingly do not bring the liberty component of s. 7 into play. In such a context, I am of the view that s. 11(d) of the Charter in no way prevents the legislature from inferring from the accused's failure to act a waiver on his or her part of the right to a fair and public hearing by an independent and impartial tribunal, provided that he or she is fully aware of the consequences of failing to act and that the procedural scheme in place provides sufficient safeguards to ensure that the conduct of the accused was not due to events over which he or she had no control. That is the case here.

Thus, for LaForest J., it was the voluntary nature of the defendant's waiver of the benefit of section 11(d) that deprived the defendant of the right to a fair trial, not the legislative scheme.

However, whether it can be said as a result of *Richard* that the default conviction process in the POA does not violate section 11(d) is an open question. The legislation considered in *Richard* provides that penalties for offences are limited to fines, and that failure to pay a fine is in no case punishable by imprisonment. In contrast, section 69(14) of the POA provides that imprisonment, subject to a means test, is available in the event that the payment of a fine is in default.⁴⁹ The Supreme Court of Canada has consistently held that the possibility of imprisonment as a penalty for a criminal or regulatory offence imperils the right to liberty of the person, and requires that the principles of fundamental justice be strictly observed.⁵⁰ The presumption of innocence, which is protected by section 11(d), is a principle of fundamental justice.⁵¹

It is clear from the judgment in *Richard* that impossibility of imprisonment as a penalty was a central factor permitting the legislature to infer a valid waiver of the defendant's section 11(d) rights from the defendant's non-attendance.

Wholesale Travel shows clearly that while the scope and extent of rights may vary depending on whether the context is regulatory or criminal, this will not be true in every case. Owing to the possibility that the offence at issue in that case would result in imprisonment, it was necessary to avoid drawing a distinction based on the regulatory nature of the offence.

49 Subsection 69(14), POA provides: If the justice is not satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time and that incarceration of the person would not be contrary to the public interest, the justice may issue a warrant for the person's committal or may order that such other steps be taken to enforce the fine as appear to him or her to be appropriate.

50 *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 221-222 and 231 (S.C.C.); see also *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 24 D.L.R. (4th) 536 at 559 (S.C.C.).

51 *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 221-222 (S.C.C.); see also *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 24 D.L.R. (4th) 536 at 550 and 557 (S.C.C.).

In the case at bar, however, there is absolutely no possibility of imprisonment, since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the Motor Vehicle Act, *supra*, can in no case result in imprisonment. Thus, the liberty component of s. 7 does not come into play. The concern of the majority of this Court in *Wholesale Travel* that a contravention might result in imprisonment does not arise here. This, therefore, is the context to be taken into account in analysing the scope of the constitutional rights at issue in this case and, more specifically, in analysing the extent to which rights conferred on accused persons under s. 11(d) of the Charter can be waived.

Adding to the lack of certainty regarding the constitutional status of the *POA* default conviction process is the distinction drawn by the Supreme Court of Canada between offences which provide for imprisonment as a penalty, and offences which provide for imprisonment as an alternative to the non-payment of a fine. While the former category of offences clearly engage a defendant's section 7 interests, the court has specifically declined to comment on the constitutional validity of a legislative scheme that provides for imprisonment in default of paying a fine for an absolute liability offence.⁵²

What then, is the appropriate categorization of the constitutional status of the *POA* default conviction process? Until there is binding authority indicating that the remote possibility of imprisonment as a penalty for non-payment of fines under the *POA* or a similar legislative scheme does not offend the principles of fundamental justice, the *POA* default conviction process is best categorized as a reasonable limit upon the section 11(d) *Charter* rights of defendants that is demonstrably justified in a free and democratic society.

2.4 Reopenings

2.4.1 Introduction

A defendant convicted of an offence without a hearing under Part I may move to have the proceedings reopened. The power of a trial justice to reopen proceedings is conferred by section 11 of the *POA*.

The reopening mechanism provides a safeguard for defendants who, through no fault of

52 In *Reference Re Section 94(2) of the Motor Vehicle Act* (B.C.) (1985), 24 D.L.R. (4th) 536 at 559 (S.C.C.), per Lamer J. (as he then was): "As no one has addressed imprisonment as an alternative to the non-payment of a fine, I prefer not to express any views in relation to s. 7 as regards that eventuality as a result of conviction for an absolute liability offence"; and in *R. v. Pontes* (1995), 100 C.C.C. (3d) 353 (S.C.C.) per Cory J. at 363: "I would leave open for future consideration the situation presented by an absolute liability offence punishable by fine with the possibility of imprisonment for its non-payment in those circumstances where the legislation provides that the imposition and collection of any fine is subject to a means test."

their own, are convicted of an offence in their absence. As discussed in Section 2.3.3, the Part I default conviction process *prima facie* offends the defendant's right to a fair trial under sections 7 and 11(d) of the *Charter*, but constitutes a reasonable limit which is demonstrably justifiable in a free and democratic society, due in part to the reopening mechanism provided by section 11.⁵³ The reopening mechanism therefore may be seen as an essential component of a procedural regime designed to balance the competing goals of maintaining the confidence of the public in the administration of justice and administrative efficiency on the one hand, and ensuring that the rights of defendants are adequately protected on the other.⁵⁴

2.4.2 Reopenings – Section 11 POA

Section 11 is the reopening provision for the *POA*. Section 11 provides:

11. (1) Reopening – If a defendant who has been convicted without a hearing attends at the court office during regular office hours within fifteen days of becoming aware of the conviction and appears before a justice requesting that the conviction be struck out, the justice shall strike out the conviction if he or she is satisfied by affidavit of the defendant that, through no fault of the defendant, the defendant was unable to appear for a hearing or a notice or document relating to the offence was not delivered.

(2) If conviction struck out – If the justice strikes out the conviction, he or she shall give the defendant and the prosecutor a notice of trial or proceed under section 7.

(3) Trial – If a notice of trial is given, the defendant shall indicate on the notice of intention to appear or offence notice if the defendant intends to challenge the evidence of the provincial offences officer who completed the certificate of offence.

(4) Notifying officer – If the defendant indicates an intention to challenge the officer's evidence, the clerk of the court shall notify the officer.

(5) Certificate – A justice who strikes out a conviction under subsection (1) shall give the defendant a certificate of the fact in prescribed form.

53 *R. v. Carson* (1983), 4 C.C.C. (3d) 476 (Ont. C.A.); *R. v. Pilipovic* (1996), 23 M.V.R. (3d) 282 (Ont. Ct. (Prov. Div.)). See also *R. v. Richard* (1996), 110 C.C.C. (3d) 385 (S.C.C.), where it was held that the default conviction process provided in New Brunswick's *Provincial Offences Procedure Act* does not violate a defendant's right to a fair trial, because the defendant's failure to act constitutes a valid waiver of his or her s.11(d) right. However, unlike proceedings under *POA*, the failure to pay a fine imposed for the contravention under consideration in *Richard* is not punishable by imprisonment.

54 See *R. v. Pilipovic* (1996) 23 M.V.R. (3d) 282 (Ont. Ct. (Prov. Div.)).

2.4.3 The Test for Reopening

Section 11(1) establishes the test to be met by a defendant convicted of an offence without a hearing to have the conviction struck out. Pursuant to section 11(1), a defendant who learns that he or she has been convicted of an offence without a hearing may attend at the court office to move for proceedings to be reopened. On the motion to reopen, the defendant must satisfy the trial justice through his or her own affidavit that, through no fault of the defendant, the defendant was:

- unable to appear for a hearing; or
- a notice or document relating to the offence was not delivered.

The motion to re-open must be brought within 15 days of the defendant having become aware of the conviction.⁵⁵ This too must be asserted in the defendant's affidavit in support of reopening. The defendant's affidavit in support of the motion to reopen shall be in Form 102.⁵⁶

If the conviction is struck by the trial justice, the defendant will be provided with a certificate signed by the justice of the peace indicating that the conviction was struck. The certificate shall be in Form 103.⁵⁷

As indicated above, proceedings may be reopened where the trial justice is satisfied that the defendant was unable to appear for a hearing through no fault of his or her own. The onus here lies solely with the defendant.⁵⁸

Proceedings may also be reopened on the alternative ground that a notice or document relating to the offence was not delivered. This alternative is more onerous for a defendant to establish due to the delivery provisions of the *POA* and the *Rules of the Ontario Court of Justice in Provincial Offences Proceedings*. Section 87 of the *POA* provides:

87. (1) Delivery – Except as otherwise provided by this Act or the rules of court, any notice or document required or authorized to be given or delivered under this Act or the rules of court is sufficiently given or delivered if delivered, whether personally or by mail.

55 Subsection 11(1).

56 R.R.O. 1990, Reg. 200, section 32(2).

57 R.R.O. 1990, Reg. 200, section 32(3).

58 *R. v. Pilipovic* (1996), 23 M.V.R. (3d) 282 (Ont. Ct. (Prov. Div.)).

(2) *Idem* – Where a notice or document that is required or authorized to be given or delivered to a person under this Act is mailed to the person at the person's last known address appearing on the records of the court in the proceeding, there is a rebuttable presumption that the notice or document is delivered to the person.

Rule 5 of the Rules of the Ontario Court of Justice in Provincial Offences Proceedings⁵⁹ provides:

5. A notice or document given or delivered by mail shall, unless the contrary is shown, be deemed to be given or delivered on the seventh day following the day on which it was mailed.

Pursuant to section 87(2), where a notice or document that is required to be delivered under the POA was mailed to the last known address of the defendant as it appears in the court records related to the proceedings, there is a rebuttable presumption that the notice or document was delivered.⁶⁰ Additionally, Rule 5 of R.R.O. Reg. 200 establishes a rebuttable presumption that a document delivered by mail is deemed to have been delivered on the seventh day following the day it was mailed. Due to the combined operation of section 87(2) and Rule 5, the alternative ground that a notice or document was not received likely will only be met where the provincial offences officer who issued the certificate of offence improperly completed the defendant's address.

2.4.4 Powers of the Justice and Defendant's Options Following Reopening

If the conviction is struck by the trial justice, the defendant has two options regarding the course of proceedings. The defendant's options are provided in section 11(2) of the POA. The defendant may request a trial, or the defendant may enter a plea of guilty with representations under section 7.

If the defendant wishes to have a trial, the trial justice will give both the defendant and the prosecutor a notice of trial.⁶¹ The defendant will then complete a notice of intention to appear, indicating whether he or she intends to challenge the evidence of the provincial offences officer who issued the certificate of offence.⁶² The notice of intention to appear may be contained on a separate document from the offence notice received by the

59 R.R.O. 1990, Reg. 200, section 5.

60 *Metropolitan Toronto (Municipality) v. Banwait* (1997), 36 O.R. (3d) 232 (Ont. Ct. (Gen. Div.)).

61 Subsection 11(2), POA.

62 Subsection 11(3), POA.

defendant when he or she was initially charged. If the defendant wishes to challenge the evidence of the officer, the clerk of the court will notify the officer.⁶³

The defendant may also enter a guilty plea with representations under section 7. A plea of guilty with representations under section 7 is discussed in Section 2.2.3.

It is important to note that a trial justice determining a motion to reopen proceedings under section 11 does not have the power to quash the certificate of offence. This is implicit in the language of section 11(2), which provides that if the conviction is struck out, the trial justice shall give the defendant and the prosecutor a notice of trial or proceed under section 7. The discretion to quash proceedings is not provided by section 11. Consequently, if the motion to reopen is granted, an application to quash the certificate of offence may only be brought on the trial date.

63 Subsection 11(4), *POA*.

Chapter Three

PRE-TRIAL MATTERS



3. PRE-TRIAL MATTERS

3.1 Introduction

*Justice must not only be done, but be seen to be done.*⁶⁴

Decisions made at the pre-trial stage are largely within the discretion of the individual prosecutor and not subject to direct judicial supervision. The conduct and result of resolution discussions are largely dictated by the prosecutor's perceptions and impressions of the charges facing the defendant. Although the justice of the peace is not actively involved in the conduct of pre-trial matters, the conduct of the prosecutor is reviewable by the trial justice. The desirability and necessity of the exercise of discretion by the prosecutor is unquestionable.⁶⁵ The following comments of LaForest J. in *R. v. Beare* illustrate the importance of prosecutorial discretion.

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on. The Criminal Code provides no guidelines for the exercise of discretion in any of these areas. The day-to-day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.⁶⁶

While recognizing that discretion is essential to the smooth operation of the justice system, the exercise of discretion must be consistent with the proper and efficient administration of justice. This requires an appreciation of the competing interests that have to be balanced in each case. These interests include those of the victim, the defendant, the public, and the efficient use of judicial resources. The prosecutor must also understand his or her role as a minister of justice.⁶⁷ Among other things, the role of minister of justice mandates that the prosecutor act fairly and impartially. An

⁶⁴ *R. v. Sussex Justices, Ex p. McCarthy*, [1924] 1 K.B. 256 at 259; *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 195-196 (S.C.C.).

⁶⁵ *R. v. Smythe* (1971), 3 C.C.C.(2d) 366 at 370 (S.C.C.); *R. v. T.(V.)* (1992), 71 C.C.C. (3d) 32 at 42 (S.C.C.).

⁶⁶ *R. v. Beare* (1988), 66 C.R. (3d) 97 at 116 (S.C.C.).

⁶⁷ The role of the prosecutor is discussed fully in Section 4.2.2, "The Prosecutor."

understanding of the role of the prosecutor and the interests that must be balanced will lead to sound decision-making at the pre-trial stage.

3.1.1 Interests of the Victim(s)

It must be emphasized that prosecutions conducted by agents for the Attorney General are undertaken in the public interest, and are not directed solely at protecting the interests of the victim. This is especially the case in the regulatory offence arena, where prosecutions are undertaken for the purpose of regulating what is essentially socially desirable conduct.

However, the interests and views of any victim(s) cannot be totally disregarded. Charging decisions that are not appropriately sensitive to the needs of the victim may not only “re-victimize” the victim, but also may result in criticism from the public at large.⁶⁸

At a minimum, the victim is entitled to an explanation of the nature of his or her role in the trial process. The prosecutor should also explain the outcome of the process to the victim, whether the matter is resolved through the entry of a guilty plea, with or without a joint submission regarding sentence, or through a trial on the merits.

3.1.2 Interests of the Defendant and Protection of the Public

Provincial offences, particularly those offences prosecuted under Part I of the *POA*, are for the most part minor regulatory offences. They represent the means employed by the state to regulate socially desirable and valuable conduct in the public interest. The goal is to protect the public from the conduct of participants in regulated areas that may subject others to the risk of harm. In contrast, the goal of the criminal law is to punish inherently wrongful and harmful conduct.⁶⁹

The process established under Part I, which gives the defendant the option of exercising his or her right to trial, balances the interest of the public in the quick, just and efficient resolution of minor regulatory offences with the defendant’s right to a fair trial.

68 Ontario, Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen’s Printer, 1993) (Chair: G.A. Martin) at 27.

69 Roach K., *Criminal Law* (Concord Ontario: Irwin, 1996) at 111.

3.1.3 The Efficient Use of Judicial Resources

While the efficient use of judicial resources is a valid factor to be considered, a prosecutor should not allow economic concerns to unduly influence decisions made at the pre-trial stage.

3.2 Charge Screening

3.2.1 Introduction

Charge Screening is the ongoing review of every charge in the provincial offences system to determine:

- whether a prima facie case exists;
- whether there is a reasonable prospect of conviction;
- whether it is in the public interest to discontinue a prosecution although a reasonable prospect of conviction exists;
- whether the proper charge has been laid;
- whether the investigation is complete and the fruits of the investigation are available for the prosecution and the defence; and
- whether it is appropriate to stay the charge pursuant to s. 32 of the *POA* or withdraw the charge.

The decision to continue or terminate a prosecution is among the most difficult that a prosecutor must make.⁷⁰ Consistent with his or her role as a minister of justice, the prosecutor has the duty to vigorously prosecute all provable charges while ensuring that no member of the community is subjected to a prosecution where no reasonable prospect of conviction exists. These competing duties are largely addressed through the process of charge screening.

The purpose of the following section is to identify mandatory rules that must be adhered to when screening a charge and to note those aspects of the process which require the prosecutor to exercise his or her discretion.

⁷⁰ Ontario, Ministry of the Attorney General, "Policy #C.S.-1: Charge Screening", *Crown Policy Manual* at 1.

3.2.2 The Charge Screening Process

The directives and guidelines that follow are in large part based upon the Ministry of the Attorney General's *Charge Screening Policy* contained in the *Crown Policy Manual*.⁷¹

Ultimately, the three most significant considerations for a prosecutor engaged in charge screening are whether a *prima facie* case exists, whether there is a reasonable prospect of conviction, and, whether it is in the public interest that the prosecution be continued.

a. Is There a *Prima Facie* Case?

The first step in the charge screening process is to determine whether a *prima facie* case exists. At this stage, the focus is three-fold. The prosecutor should ensure the following:

- that there is evidence on all essential elements of the charge which, if believed and unanswered, would warrant a finding a guilt;⁷²
- that there are no jurisdictional obstacles that would constitute a fatal flaw to the prosecution of the charge;⁷³ and
- where the defendant has been served with an offence notice, ensuring that the certificate of offence is sufficient on its face, and if not, determining whether the defect can be cured by an amendment.⁷⁴

b. Is There a Reasonable Prospect of Conviction?

If a *prima facie* case exists, the prosecutor must then determine whether there is a reasonable prospect of conviction.

The test of reasonable prospect of conviction is an objective one. It signifies that a guilty verdict would not be unreasonable. Satisfying the test does not require a conclusion that a conviction is more likely than not, which is too onerous a standard. A reasonable prospect of conviction intimates something greater than a *prima facie* case, but is not as stringent as proof on a balance of probabilities (a 51% chance of conviction).

⁷¹ Ontario, Ministry of the Attorney General, "Policy #C.S.-1: Charge Screening", *Crown Policy Manual*.

⁷² *Mezzo v. R.* (1986), 27 C.C.C. (3d) 97 at 102 (S.C.C.) *per* McIntyre J.

⁷³ Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) (Chair: G. A. Martin) at 60. Section 34 of the POA gives the court broad powers to amend defects on the face of the certificate of offence "at any stage of the proceedings". The primary consideration taken into account by the court in amending the certificate of offence is "whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission" (s.34(4)(c) POA).

⁷⁴ Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 62.

To determine whether a reasonable prospect of conviction exists, the prosecutor should consider the following factors:

- the availability of evidence;
- the admissibility of evidence;
- the credibility of witnesses, while keeping in mind that the determination of credibility ultimately is for the trial justice; and
- any defences that could reasonably be anticipated or have been brought to the attention of the prosecutor.

c. *Is it in the Public Interest to Continue the Prosecution?*

Once it has been determined that there is a reasonable prospect of conviction, the prosecutor may consider whether the prosecution should nevertheless be discontinued in the public interest. Consideration of the public interest in a prosecution must only be taken into account *after* it has been determined that there is both a *prima facie* case, and a reasonable prospect of conviction.

The following factors *must not be considered* while determining whether it is in the public interest to continue or discontinue a prosecution:

- the defendant's race, religion, sex, national origin, political associations or status in life;
- personal feelings concerning the defendant or any alleged victims;
- any political repercussions that may flow from the decision to continue or discontinue the prosecution; and
- the possible personal or professional impact of the prosecution on anyone connected to the prosecution.

The following factors may be considered while determining whether it is in the public interest to continue or discontinue a prosecution:

- the gravity or triviality of the circumstances underlying the charge, keeping in mind that offences prosecuted by way of certificate of offence are for the most

part relatively minor regulatory offences;⁷⁵

- the circumstances or views of any victim(s);
- the age, physical health, mental health or special infirmity of the defendant or witness;
- the need to maintain public confidence in the administration of justice; and
- the strength of the prosecution's case.

Although a prosecutor engaged in charge screening may withdraw a charge in appropriate circumstances, given the relatively minor regulatory nature of proceedings commenced by certificate of offence, it will rarely, if ever, be appropriate to withdraw a charge on the basis that the circumstances of the alleged offence are too insignificant to engage the prosecutorial mechanism of the state. First, respect for the regulatory powers of the state requires effective enforcement, regardless of the prosecutor's own subjective view of the triviality of the offence. Second, the Part I procedure reflects the limited inconvenience and prejudice that a defendant suffers as a result of prosecution, which weighs against a withdrawal.

It must be emphasized that the obligation to screen charges is on-going. A prosecution must be discontinued if it becomes apparent at any stage of the proceedings that a reasonable prospect of conviction does not exist, or that it is not in the public interest that the prosecution be continued.

3.3 Disclosure

Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11(d) of the *Charter* provides:

11. Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

⁷⁵ *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 357 (S.C.C.); Drinkwater W.D. and Ewart J.D., *Ontario Provincial Offences Procedure* (Toronto: Carswell 1980) at 11-12 and 16-17.

Additionally, s. 46(2) of the *POA* provides:

46. (2) Right to defend – The defendant is entitled to make full answer and defence.

A defendant has common law and constitutional rights to a fair trial and to make full answer and defence. The right of a defendant to make full answer and defence and the right to a fair trial are both principles of fundamental justice constitutionally protected by s. 7 of the *Charter*. The right to a fair trial is also protected by s. 11(d).

3.3.1 The Prosecutor's Duty to Disclose

The prosecutor's duty to disclose is an adjunct to the right to make full answer and defence.⁷⁶ The failure to provide full disclosure impedes the ability of the defendant to make full answer and defence,⁷⁷ which may deprive the defendant of a fair trial.

The duty to disclose arises out of the prosecutor's role as a minister of justice. The duty to disclose was discussed by Sopinka J., in *R. v. Stinchcombe*:

[T]he fruits of an investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution.⁷⁸

The prosecutor has the duty to disclose all relevant material which he or she proposes to use at trial, and, in particular, all evidence which may assist the defendant during cross examination or otherwise, even if the prosecutor does not intend to adduce it.⁷⁹

Except in cases where non-disclosure is justified on the grounds of privilege,⁸⁰ or on the basis of any overriding public interests,⁸¹ all relevant information in the possession of the prosecution ought to be disclosed unless there is no reasonable possibility that the withholding of the information will impair the defendant's right to make full answer and

76 *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40 (S.C.C.).

77 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 9 (S.C.C.).

78 *R. v. Stinchcombe*, *supra* at 7.

79 *R. v. C.(M.H.)* (1989), 46 C.C.C. (3d) 142 at 155 (B.C.C.A.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 11, 14 (S.C.C.).

80 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 12 (S.C.C.).

81 *R. v. Farnacci* (1994), 88 C.C.C. (3d) 1 at 55 (S.C.C.).

defence.⁸² When in doubt, the prosecutor must err on the side of full disclosure.

The duty to disclose extends to the police. The duty of the prosecutor to make full disclosure obliges the prosecutor to obtain from the police all relevant information and material concerning the case. The police have a corresponding duty to provide the prosecutor with the fruits of its investigation to enable the prosecutor to meet its constitutionally mandated duty.⁸³ The duty of full disclosure applies to summary conviction, regulatory⁸⁴ and provincial offences.⁸⁵

3.3.2 What Does Not Have to be Disclosed

The prosecutor is obliged to disclose only what is in its possession or control.⁸⁶ The prosecutor need not disclose what is clearly irrelevant, nor is there an obligation to disclose material prior to trial when the relevance of the material only becomes apparent during the trial itself.⁸⁷ However, the duty to disclose is ongoing. Thus, if undisclosed material acquires relevance during the trial it must be disclosed immediately. *Stinchcombe* also provides that the duty to disclose in the provincial offences context may be of a more limited nature, and many of the aspects of the duty to disclose may not apply or apply with less impact.⁸⁸ The policy of the Ministry of the Attorney General with respect to disclosure is reproduced below in section 3.3.4.

3.3.3 Benefits of Full Disclosure

Timely and full disclosure benefits both the defendant and the administration of justice as a whole. These benefits include:⁸⁹

- efficient use of court time through the resolution of non-contentious issues in advance of trial; and
- early resolution of cases through guilty pleas or withdrawal of charges.

⁸² *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 12 (S.C.C.).

⁸³ *R. v. T.(L.A.)* (1993), 84 C.C.C. (3d) 90 at 94 (Ont. C.A.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

⁸⁴ *R. v. NBIP Forest Products Inc.* (1994), 146 N.B.R. (2d) 276 (Q.B.).

⁸⁵ *R. v. Vanbots Construction Corp.*, [1996] O.J. No. 347 (Ont. Ct. (Prov. Div.)) (Q.L.).

⁸⁶ *R. v. Stinchcombe* (#2) (1995), 96 C.C.C. (3d) 318 (S.C.C.).

⁸⁷ *R. v. Wilson* (1994), 87 C.C.C. (3d) 115 at 120 (Ont. C.A.).

⁸⁸ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13 (S.C.C.); *R. v. Vanbots*, *supra* at para.15.

⁸⁹ Ontano (Ministry of the Attorney General), "Policy D-1: Disclosure", *Crown Policy Manual*.

3.3.4 Disclosure and the Unrepresented Defendant

In the context of a criminal prosecution, the Crown has a duty to inform an unrepresented defendant of the availability of disclosure, and the trial justice should not allow a guilty plea to be taken unless satisfied that the defendant has been so informed.⁹⁰

However, the Crown's duty to inform an unrepresented defendant of his or her right to disclosure is not implicated where a defendant insists on pleading guilty at his or her first appearance.⁹¹ Moreover, if the undisclosed materials are immaterial, *i.e.* they do not raise a doubt regarding the validity of the guilty plea or provide an evidentiary basis for any potential defence, the defendant's right to make full answer and defence is not impaired by the non-disclosure, nor by the taking of a guilty plea without the defendant having been informed of his or her disclosure rights.⁹²

The prosecutor in the provincial offences arena does not have an obligation to inform unrepresented defendants of their disclosure rights. The comments in the preceding paragraph illustrate that even in criminal prosecutions, the Crown's duty to inform unrepresented defendants of the availability of disclosure has been qualified. Additionally, *Stinchcombe* specifically indicates that the duty to disclose in provincial offence prosecutions may be of a more limited nature.⁹³ Finally, informing unrepresented defendant's of the availability of disclosure is tantamount to providing legal advice, which prosecutors should avoid. These observations have informed the Ministry of the Attorney General's policy regarding disclosure in POA prosecutions, which provides that defendants are to be provided with disclosure, *upon request* only.⁹⁴ Paragraph 21 of the Ministry of the Attorney General's *Policy on Disclosure* provides the following:

21. In Provincial Offence prosecutions, *upon request*, the defendant in a minor part one offence will be provided with a copy of the certificate of offence and a copy of the notes of the police officer and witnesses if any.

For more serious part one offences, *upon request*, the defendant will be provided with the above plus a copy of any accident reports or other documents to be utilized in the prosecution. [emphasis added]

90 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 14 (S.C.C.).

91 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 328-29 (C.A.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13 (S.C.C.).

92 *R. v. T.(R.)*, *supra* at 528-529; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40 (S.C.C.).

93 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13 (S.C.C.).

94 Ontario (Ministry of the Attorney General), "Policy D-1: Disclosure", *Crown Policy Manual*.

utilized in the prosecution. [emphasis added]⁹⁵

3.4 Resolution Discussions (Plea Bargaining)

3.4.1 Introduction

Resolution discussions or “plea bargaining” are an essential component of the prosecution of provincial offences. Resolution discussions allow for the early resolution of charges without the need for a trial, which can benefit the defendant, as well as victims, witnesses, counsel, the police and the administration of justice generally.⁹⁵ Pursuant to s. 45(4) of the *POA*, the court may accept a guilty plea to an included offence or any other offence, with the consent of the prosecutor. Section 45(4) provides:

45. (4) Plea of guilty to another offence – Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty.

Note, the wording of the section is not mandatory. This language confers on the court, the discretion to reject a joint submission. Thus, in effect the court has an indirect supervisory jurisdiction over resolution discussions.

3.4.2 Principles of Resolution Discussions

The following principles are based upon the Ministry of the Attorney General's policy regarding resolution discussions contained in the *Crown Policy Manual*:⁹⁶

While conducting resolution discussions, a prosecutor seeks to balance the following:

- interests of any victims;
- interests of the defendant;
- protection of the public; and

⁹⁵ Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, (Toronto: Queen's Printer, 1993) (Chair: G. Arthur Martin); Ontario, (Ministry of the Attorney General), “Policy #R-1: Resolution Discussions”, *Crown Policy Manual*.

⁹⁶ Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, (Toronto: Queen's Printer, 1993) (Chair: G. Arthur Martin).

- the efficient use of limited resources.⁹⁷

In addition, a prosecutor must adhere to the following principles:

- a prosecutor must have a thorough understanding of the charge and evidence against a defendant before engaging in resolution discussions. Thus, it is essential that a charge be screened prior to any resolution discussions.
- a prosecutor must never accept a guilty plea to a charge knowing that the defendant is innocent.
- a prosecutor must never accept a guilty plea to a charge when a material element of that charge cannot be proven, unless that fact is fully disclosed to the defendant.
- the charges proceeded with on a guilty plea as well as any sentence submissions made by the prosecutor with respect to those charges must adequately reflect the gravity of the provable offence or offences.
- the prosecutor must not purport to bind the Attorney General's right to appeal any sentence.

In the case of serious provincial offences, a prosecutor should consider the interests of any victim(s), and where possible, consult with the victim(s) before arriving at an agreement.

As a general rule, a prosecutor must honour all agreements reached after resolution discussions.

Provided that (i) the charges proceeded with on a guilty plea and any sentence submissions adequately reflect the gravity of provable offences, and (ii) it is in the public interest to do so, a prosecutor may:

- accept a plea to a reduced number of provable charges and/or accept a plea to a lesser offence;
- join with the defendant to make a joint submission on sentence after a plea of guilty; and

⁹⁷ The interests that the Prosecutor seeks to balance while conducting resolution discussions are discussed in the Introduction to this chapter.

- consider that an early guilty plea is a mitigating factor to be taken into account.

An early guilty plea is a particularly mitigating factor. Generally, the earlier in the proceedings that a guilty plea is entered, the greater are both the remorse expressed by the defendant and the savings to the administration of justice.

Accordingly, a prosecutor's submissions on sentence may reflect the benefits of an early guilty plea. In particular:

- if the guilty plea is entered at first attendance or on the defendant's first court appearance, a prosecutor should submit that the appropriate sentence is in the bottom end of the range of sentence given the offence and the particular defendant; and
- if the guilty plea is entered after a trial date has been set or on the date of trial, judicial resources have been wasted and the defendant's remorse may be questionable. Accordingly, it would now be inappropriate for a prosecutor to submit a sentence in the bottom end of the range of sentence available given the offence and the particular defendant.

3.4.3 Courtroom Practice Following Resolution Discussions

At the conclusion of resolution discussions, the prosecutor should state on the record in court that resolution discussions have been held and that an agreement has been reached.

The court should be advised of all facts that are relevant, material and provable. Where not all matters are admitted by the defendant on the guilty plea, a prosecutor has two options:

- advise the court of the allegations and proceed on the admitted facts only; or
- prove the disputed fact through the calling of evidence.⁹⁸ In deciding whether to use this alternative, a prosecutor should consider the following:
 - a) the strength of the evidence in support of the disputed fact;
 - b) whether the fact will make a difference in aggravation or mitigation of sentence; and

⁹⁸ Note that it is incumbent upon the prosecutor to prove an aggravating circumstance not admitted to by the defendant beyond a reasonable doubt, *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514-516 (S.C.C.).

- c) whether the time necessary to prove the fact and the impact of the fact is consistent with the rational and efficient use of limited resources.

3.5 First Attendance

3.5.1 Introduction

First Attendance Meetings are an administrative process available to some defendants charged with Part I offences.⁹⁹ First Attendance Meetings are a significant part of the provincial offence system. They provide a single forum for charge screening, disclosure, resolution discussions.¹⁰⁰ First Attendance Meetings also reduce backlogs in the courts and improve administrative efficiency, and allow limited court resources to be focused on cases that proceed to trial.

3.5.2 Availability of First Attendance Meetings

A First Attendance Meeting will be available to a defendant when the offence notice is returnable to a court in a designated area of the province.¹⁰¹

Sections 5 and 5.1 of the *POA* govern the manner in which a defendant must give notice of intention to appear in court for the purpose of entering a plea and having a trial. Section 5 applies to non-designated areas of the province, while s. 5.1 applies to designated areas.¹⁰²

Pursuant to s. 5.1(3) *POA*, defendants served with an offence notice in designated areas of the province must attend in person or by an agent to file a notice of intention to appear in court for the purposes of entering a plea and having a trial. This is in contrast to

98 Note that it is incumbent upon the prosecutor to prove an aggravating circumstance not admitted to by the defendant beyond a reasonable doubt, *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514-516 (S.C.C.).

99 Note that First Attendance meetings are also available to defendants charged with Part II offences pursuant to Section 17.1 of *POA*. The procedure under Part II differs from the procedure under Part I.

100 Ontario, Ministry of the Attorney General, "Policy #R-1: Resolution Discussions", *Crown Policy Manual*.

101 Parts of Ontario are designated in O. Reg. 950 in section 4.5.

102 Pursuant to s. 4.5 of R.R.O. 1990, Reg. 950 (Proceedings Commenced by Certificate of Offence), the following areas are designated for the purposes of s. 5.1 of the *POA*: County of Northumberland, County of Peterborough, Municipality of Metropolitan Toronto, Regional Municipality of Peel, Township of Bircroft in the County of Haliburton, Township of Cardiff in the County of Haliburton, and that part of the King's Highway known as No. 115 Township of Manvers in the County of Victoria.

defendants served with offence notices in non-designated areas, who may file a notice of intention to appear by signing option 3 on the back of the offence notice and delivering the notice in person or by mail to the court office specified.¹⁰³

When a defendant attends at the court office in a designated area to request a trial, the clerk of the court will advise the defendant of the availability of a First Attendance Meeting with a prosecutor to discuss the possibility of resolving the charge prior to trial before filing the notice of intention to appear. If the defendant chooses to have a First Attendance Meeting, the clerk will schedule the meeting and issue a First Attendance Notice, which is served on the defendant and the prosecutor.¹⁰⁴

The prosecutor will be provided with the prosecution file prior to the First Attendance Meeting. This gives the prosecutor an opportunity to screen the charge against the defendant prior to the First Attendance Meeting to determine whether the case should proceed. If a determination is made that the case should proceed, the prosecutor should consider in advance the position to be taken with respect to the possible reduction of the offence or sentence. In determining whether a charge should proceed, the prosecutor must consider whether a *prima facie* case exists, whether there is a reasonable prospect of conviction, and if so, whether it is in the public interest that the charge proceed.¹⁰⁵

At the First Attendance Meeting, the defendant should be provided with disclosure upon request. As indicated in the previous paragraph, the prosecutor may also engage in resolution discussions with the defendant. The prosecutor may discuss the circumstances of the charge, possible penalties upon conviction, and propose a plea to a reduced charge or a reduction in sentence upon guilty plea.¹⁰⁶ However, during resolution discussions, the prosecutor should avoid giving legal or other advice to the defendant. [See "Matters to Avoid at First Attendance Meetings", below.]

If the defendant and the prosecutor do not reach an agreement, the defendant must file a notice of intention to appear with the clerk of the court who will schedule a trial.

103 Section 5(1) of the POA.

104 S. Stewart and J. Macey, *Stewart and Macey on Provincial Offences Procedure in Ontario* (Toronto: EarlsCourt, 1998) at 22.

105 Refer to Section 3.2 "Charge Screening".

106 S. Stewart and J. Macey, *Stewart and Macey on Provincial Offences Procedure in Ontario* (Toronto: EarlsCourt, 1998) at 25. Section 45(4) of the POA allows the court to take a plea of guilty to "any other offence, whether or not it is an included offence" with the consent of the prosecutor, while s.59(2) provides that the Court may substitute a fine less than the prescribed minimum if to impose the minimum fine "would be unduly oppressive or otherwise not in the interests of justice".

If an agreement is reached, both the prosecutor and the defendant must attend before a justice of the peace to dispose of the charge. Depending upon the court location, the justice of the peace may be presiding in a courtroom or an office constituted as a courtroom for the purposes of taking guilty pleas.¹⁰⁷

3.5.3 Principles of First Attendance Meetings

While conducting a First Attendance Meeting, a prosecutor should be mindful of and seek to balance the following interests:

- the interests of any victim(s);
- the protection of the public;
- the rights of the defendant; and
- the efficient and optimal use of limited resources.¹⁰⁸

a. Charge Screening

All charges must be screened by a prosecutor upon receipt of the prosecution file and before conducting a First Attendance Meeting.¹⁰⁹

b. Disclosure

Upon request, the defendant in a minor Part I offence will be provided with a copy of the certificate of offence and a copy of the notes of the police officer and witnesses, if any. For more serious Part I offences, the defendant will also be provided with a copy of any accident report or other documents to be utilized by the prosecutor.¹¹⁰

c. Resolution Discussions

It is both proper and desirable for the prosecutor to engage in Resolution Discussions with a defendant at a First Attendance Meeting.¹¹¹

¹⁰⁷ Section 7 of the POA.

¹⁰⁸ The interests to be balanced by the prosecutor during the conduct of First Attendance Meetings are discussed in the Introduction to this Chapter.

¹⁰⁹ Refer to Section 3.2, "Charge Screening".

¹¹⁰ Refer to Section 3.3, "Disclosure".

¹¹¹ Refer to Section 3.4, "Resolution Discussions".

3.5.4 Matters to Avoid at First Attendance Meetings

A prosecutor should avoid the following at First Attendance Meetings:

- giving legal advice. A defendant will often ask about the implications of a decision to proceed to trial, or whether the defendant ought to accept the prosecutor's offer to reduce the sentence. These and analogous matters should not be commented upon;
- giving advice regarding the extra-judicial consequences of a conviction. A defendant will often ask about the possible effects of a conviction on his or her car insurance or demerit points. These and analogous matters should not be commented upon; and
- accepting a notice of intention to appear for later filing.

3.5.5 Courtroom Practice Following First Attendance Meeting

If the defendant wishes to plead guilty following the First Attendance Meeting, the guilty plea must be entered in open court.¹¹² The guilty plea may be taken in an actual courtroom, or an office constituted as a courtroom for the purpose of taking guilty pleas.

Any charge that is withdrawn because there is: (a) no reasonable prospect of conviction; or (b) it is not in the public interest to proceed with the charge, must be spoken to in court. The prosecutor should give brief reasons for the withdrawal, substitution or reduction of a charge.

Any charge for which the prosecutor directs the clerk of the court to enter a stay must also be spoken to in court.¹¹³ Brief reasons should accompany the entry of a stay.

Upon disposition or resolution of a charge, the prosecutor should communicate with the victim(s) in a case involving serious injury or a disability. In appropriate cases, this task

¹¹² Refer to Section 3.4, "Resolution Discussions".

¹¹³ The authority to enter a stay of proceedings is conferred by section 32(1) POA, which provides: 32. (1) Stay of proceeding – In addition to his or her right to withdraw a charge, the Attorney General or his or her agent may stay a proceeding at any time before judgement by direction in court to the clerk of the court and thereupon any recognizance relating to the proceeding is vacated.

may be delegated to a police officer.

Chapter Four

THE TRIAL

4. The Trial

4.1 Introduction – The Trial Process

The trial process commences with the arraignment of the defendant.¹¹⁴ The arraignment involves the defendant entering a plea to the charge against him or her contained in the certificate of offence. By pleading to the charge, the court now has jurisdiction over the defendant's person. If the defendant pleads guilty, a conviction is entered and sentence passed.¹¹⁵ If a plea of not guilty is entered, a trial is held.¹¹⁶

Before the defendant pleads to the charge, he or she may move to quash the certificate of offence on the ground that it contains a defect apparent on its face.¹¹⁷ If the motion is granted, the certificate of offence is a nullity and the charge dismissed.

Prior to the calling of evidence, the parties may deal with a variety of preliminary issues related to the admissibility of evidence. Typically, *voir dire*s into the admissibility of statements are held. Alternatively, *voir dire*s into the admissibility of contentious evidence may be conducted later, when the witness through whom the contentious evidence will be adduced is called.

The prosecution has the burden of proving the defendant's guilt. Accordingly, the prosecution presents its case first. If the parties have made any formal admissions of fact, they present the court with an agreed statement of facts before any witnesses are called. The court may take the admitted facts into account in rendering its verdict at the end of the case without need for formal proof of the facts.¹¹⁸

The prosecutor presents its evidence against the defendant through the testimony of witnesses. As is the case at all stages of the trial, the witness is first examined-in-chief by the party calling him or her.¹¹⁹ The witness is asked a number of questions, and the witness' responses are evidence. The prosecutor aims to ask questions in such a way that the evidence relevant to the charge is presented in an efficient and clear manner.

¹¹⁴ See Chapter 4.9 and Section 45 POA.

¹¹⁵ Section 45 POA.

¹¹⁶ Section 46(1) POA.

¹¹⁷ Pursuant to section 36(1), a motion to quash must be brought before the defendant enters a plea, and thereafter only with leave of the court.

¹¹⁸ Section 46(4).

¹¹⁹ Section 46(3).

Once the examination-in-chief is finished, the defendant or his or her agent may cross-examine the witness.¹²⁰ The purpose of cross-examination is to challenge the testimony of the witness. The questions asked are designed to explain, qualify or rebut the testimony of the witness-in-chief, adduce evidence helpful to the defendant, or impeach the reliability of the witness' testimony.

At the completion of the cross-examination, the prosecutor may re-examine the witness to clarify answers given during cross-examination, or to address new matters raised by the defence during cross-examination. Re-cross-examination may then be permitted if the prosecutor has raised any new issues. The trial justice may also ask the witness questions regarding his or her testimony, and both parties may be given the opportunity to ask further questions to address any issues raised by the justice's questions.

This process is repeated for all of the prosecution witnesses. When all of the prosecution witnesses have completed their testimony, the prosecutor indicates to the court that the case for the prosecution is complete.

The defendant will then be called upon to answer the case for the prosecution. Before doing so, the defendant may bring a motion for *non-suit*. On the motion, the defendant asks the trial justice to find that the prosecution has not established a *prima facie* case against the defendant.¹²¹ If the motion for *non-suit* is successful, the charge is dismissed and an acquittal entered.

If the motion for *non-suit* is unsuccessful, the defendant may choose to call a defence, or may decline to do so. If the defendant takes the latter course, the prosecutor will be given an opportunity to make submissions to persuade the trial justice of the defendant's guilt. The defendant may then make submissions to the contrary. After hearing submissions from both parties, the justice will render a decision.

If the defendant elects to call evidence, the evidence is presented in the same manner as the prosecution case, *i.e.* examination-in-chief, cross-examination, re-examination, etc. At the close of the defence case, the prosecutor may be allowed to call reply evidence if the defence evidence raised issues that the prosecutor could not have reasonably anticipated arising, or the evidence adduced by the defendant makes previously inadmissible evidence admissible.

¹²⁰ Section 46(3).

¹²¹ A *prima facie* case exists where there is any evidence on each element of the offence, which, if believed, would entitle a reasonable trier of fact to convict.

For example, the defendant may bring his character into issue by testifying that he is an excellent driver. Consequently, the prosecutor would now be permitted to adduce the defendant's driving record to rebut the defendant's assertion.

Once the defence case is complete and reply evidence, if any, is called, both parties may make submissions in support of its position. At common law, the order in which the parties make their final submissions depends upon whether the defendant has called any evidence. If the defendant called any evidence, he or she must make his or her submissions first. After hearing submissions from the parties, the trial justice renders a verdict. The trial justice may or may not give written or detailed reasons.

If the verdict is guilty the trial justice will then impose sentence, after giving both parties an opportunity to make submissions.

4.2 Parties

4.2.1 Introduction – The Adversarial System

The trial process in Canada is based on an adversarial model where two parties vigorously advocate their positions before an independent, neutral and judicial third party whose primary function is to determine the issues raised by the parties. The respective roles of the prosecutor, the justice of the peace and defence counsel or agent in the provincial offences system are discussed in the passages that follow.

4.2.2 The Prosecutor

Prosecutor is defined in section 1 of the *POA*. Section 1(1) provides:

1.(1) Definitions – In this Act,

“prosecutor” means the Attorney General or, where the Attorney General does not intervene, means the person who issues a certificate or lays an information and includes counsel or agent acting on behalf of either of them;

The Municipal Prosecutor

For the purpose of Part X of the *POA*, where a municipality has entered into an agreement with the Attorney General to perform court administration and prosecutorial functions section 167(2) defines a prosecutor as follows:

(2) **Definition “prosecutor”** – For the purposes of this Part, “prosecutor” means the Attorney General or, where the Attorney General does not intervene, means a person acting on behalf of the municipality in accordance with the agreement or, where no such person intervenes, means the person who issues a certificate or lays an information, and includes counsel or agent acting on behalf of any of them.

The role of the prosecutor in the trial process is unique. The role of the prosecutor is to be impartial and excludes any notion of winning or losing. It is important for counsel, whether for the Crown or the defence not to express his own opinion as to the guilt or innocence of the accused.¹²²

Rule 4.01 (3) commentary of the Law Society of Upper Canada's *Rules of Professional Conduct (LSUC)* addresses the duty of the prosecutor. The role provides as follows:

Duty as Prosecutor:

9. Duty as Prosecutor 4.01 (3) When a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect. When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel, or directly to an unrepresented accused, of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

In summary, the role of prosecutor is to present credible evidence relevant to the alleged offence in an impartial manner to ensure that justice is done.

4.2.3 Role of Defence Counsel or Agent

The combined provisions of sections 50 and 82 of the *POA* clearly establish that a defendant may act personally or by counsel or agent.

Section 50(1) of the *POA* provides that a defendant may appear and act personally or by

¹²² *Boucher v. R.* (1954), 110 C.C.C. 263 (S.C.C.); See also *R. v. Durocher* (1963), 41 C.R. 350 (B.C.C.A.); *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Cook* (1997), 1 S.C.R. 1113.

counsel or agent.

Section 50 (2) provides that where the defendant is a corporation it shall appear and act by counsel or agent.

Section 82 provides that a defendant may act by counsel or agent.

It should be noted that no person, otherwise fit to stand trial, can be forced to have counsel.¹²³ Where the accused chooses to proceed without representation they assume the risks and disadvantages of appearing without counsel.

Counsel

Defence counsel's paramount duty is to represent the client resolutely and honourably within the limits of the law while treating the tribunal with candor, fairness, courtesy and respect. Defence counsel has an obligation to defend the client.¹²⁴ In doing so, defence counsel "has no obligation to assist the prosecution and is entitled to assume a purely adversarial role."¹²⁵

The partisan role of defence counsel is, however, tempered by ethical obligations to the court. Defence counsel must not knowingly permit false evidence or deceive the tribunal.¹²⁶ Nor may defence counsel needlessly abuse, hector or harass a witness.¹²⁷ At all times defence counsel shall be courteous, civil and act in good faith to the tribunal and with all persons whom the lawyer has dealings.¹²⁸

Moreover, counsel is not merely the mouthpiece for the client.¹²⁹ Counsel has been retained because counsel possesses skill, judgment and experience superior to that of the client in the courtroom. Counsel does a disservice to the client by simply following the client's wishes regarding the conduct of the defence where those wishes do not represent the best way to defend the client.

In addition, blindly following the client's instructions may result in a breach of counsel's ethical obligations to the court. For example, a client charged with speeding may admit to

¹²³ *R. v. Romanowicz* (1998), 14 C.R. (5th) 100 (Ont. Ct. (Gen. Div.)); *R. v. Romanowicz* (1999), 26 C.R. (5th) 246 (Ont. C.A.).

¹²⁴ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01 (1), Commentary, which advises that defence counsel's "duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged".

¹²⁵ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 7 (S.C.C.).

¹²⁶ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01 (2)(e).

¹²⁷ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01 (2)(k).

¹²⁸ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01 (2)(6).

¹²⁹ G.A. Martin, *The Role and Responsibility of the Defence Advocate* (1970), 12 Crim. L.Q. 376.

counsel that he or she actually was speeding, but ask counsel to show that the charging officer is lying about the circumstances supporting the defendant's guilt. Admissions made by a client to counsel restrict the conduct of the defence. In these circumstances, counsel still may object to the jurisdiction of the court, to the form of the certificate of offence, or to the admissibility or sufficiency of the evidence against the defendant. However, counsel can not suggest that the defendant is not guilty of the offence charged, or call evidence which counsel knows is false by reason of the client's admission.¹³⁰

An accurate statement of the role of defence counsel is to defend her client while adhering to ethical and legal constraints imposed on all members of her profession.

Agents

Like defence counsel, agents are to represent the interests of their clients to the best of their ability.

However, unlike counsel, agents need not be members of the Law Society of Upper Canada and consequently, are not governed by the *Rules of Professional Conduct*.¹³¹

This, however, does not mean that the court or prosecutors are without recourse in the face of an unethical or incompetent agent. Section 50(3) of the *POA* provides:

50. (3) Exclusion of agents – The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practice in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears as agent or does not understand and comply with the duties and responsibilities of an agent.

Accordingly, the justice has the discretion to bar an agent from appearing before the court where the agent is not competent to represent his or her client, or does not understand or comply with "the duties and responsibilities of an agent". Note that the exclusionary power conferred by section 50(3) is limited in its application to agents, and may not be invoked to exclude a lawyer from the courtroom.

¹³⁰ Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01 (1), Commentary.

¹³¹ Note on November 17, 1999 a news release announced the appointment of the Honourable Peter Cory, former Justice of the Supreme Court of Canada to act as a facilitator and to make recommendations to the Attorney General on the role of paralegals in the justice system.

The role of agents in criminal and quasi-criminal matters was the subject of the 1998 decision, *R. v. Romanowicz*.¹³² The Ontario Court of Appeal affirmed the earlier decision, rejecting the defendant's submission that the trial judge erred when he permitted the agent to appear in the absence of an assurance of the agent's competency. The court stated that where an accused is represented by a paid non-lawyer agent, the trial judge must satisfy him or herself that the accused's choice of representation was an informed one. This obligation would not require a trial judge to conduct a competency inquiry of the agent. An accused represented by a non-lawyer agent who is unsuccessful at trial cannot complain that the conviction constitutes a miscarriage of justice because the agent failed to meet the competent lawyer standard but rather must demonstrate that the agent's conduct produced a miscarriage of justice.¹³³

Although not bound by the LSUC *Code of Professional Conduct*, the role of an agent is to represent their client to the best of their ability.

4.2.4 The Trial Justice

a. Generally

In the paradigmatic adversarial system of justice, the trial justice is the neutral third party arbiter who determines which evidence will be admissible at trial and ultimately determines the guilt or innocence of the defendant.¹³⁴ The trial justice also controls the courtroom; he or she is responsible for ensuring that the parties conduct themselves appropriately, and that all parties abide by the rules of procedure.

The following passage from *Jones v. National Coal Board* succinctly describes the role of the trial justice in our adversarial system:

In the system of trial we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth and to do justice according to law.

The judge's part in all this is to harken to the evidence, only himself asking

¹³² *R. v. Romanowicz* (1998), 14 C.R. (5th) 100 (Ont. Gen. Div.); *R. v. Romanowicz* (1999), 26 C.R. (5th) 246 (Ont. C.A.).

¹³³ *R. v. Romanowicz* (1999), 26 C.R. (5th) 246 (Ont. C.A.).

¹³⁴ *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), leave to appeal ref'd 26 C.C.C. (3d) 207n (S.C.C.).

questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and to keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well.¹³⁵

It is apparent from Lord Denning's comments that to describe the trial justice as merely an umpire is an oversimplification. While it is true that the trial justice's primary concern is to reach a decision on the basis of the evidence put before him or her and the submissions of the parties,¹³⁶ the trial justice must also ensure not only the fairness of the trial process, but also the appearance of fairness.¹³⁷ Fulfilling this competing duty may compel the trial justice to abandon his or her position of judicial detachment to become an active participant in the trial process.¹³⁸ The level of participation necessary to ensure the fairness of the trial depends upon the circumstances of the particular case.¹³⁹

b. Controlling the Conduct of Cross-examination

Cross-examination is an essential component of the adversarial system of justice. Our system of justice is premised on the principle that the truth will emerge from conflict and confrontation. Cross-examination is the primary means available to a party to find the "truth." Through cross-examination, a party can test, contradict or explain the evidence tendered by his or her opponent. "The opportunity of cross-examination is an essential safeguard of the accuracy and completeness of testimony."¹⁴⁰ Given the importance of cross-examination to the trial process, wide latitude is accorded counsel during cross-examination to conduct a "searching inquiry" into the matters raised by the testimony of any witness.¹⁴¹ It is an error for a trial justice to impose, in advance, a time limit or restrictions upon the length of cross-examination.¹⁴²

¹³⁵ *Jones v. National Coal Board*, [1957] 2 All E.R. 155 at 159 *per* Lord Denning (C.A.).

¹³⁶ *R. v. B.(J.J.)* (1992), 75 C.C.C. (3d) 413 at 418 (Nfld. C.A.), leave to appeal *ref'd* 78 C.C.C. (3d) vi (S.C.C.).

¹³⁷ *R. v. Sussex Justices, Ex. p. McCarthy*, [1924] 1 K.B. 256 at 259; *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 196 (S.C.C.); *R. v. Sherry* (1996), 110 C.C.C. (3d) 160 at 161 (S.C.C.).

¹³⁸ *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 196 (S.C.C.).

¹³⁹ *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 at 231 (Ont. C.A.).

¹⁴⁰ *R. v. Rowbotham* (1977), 2 C.R. (3d) 293 at 297 (Ont. Co. Ct.).

¹⁴¹ *R. v. Fanjoy* (1985), 21 C.C.C. (3d) 312 at 316-317 (S.C.C.); *R. v. Varga* (1994), 90 C.C.C. (3d) 484 at 498 (Ont. C.A.).

¹⁴² *R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 (Ont. C.A.).

There are, however, limits on the conduct of a cross-examination. "The search for truth is not, of course, an absolute value in a criminal trial and must sometimes yield to other values recognized by the criminal justice system, such as, fairness, openness and protection from oppressive questioning."¹⁴³ Accordingly, the trial justice has a general discretion to limit a cross-examination where it is repetitive, irrelevant¹⁴⁴ or insulting.¹⁴⁵ This discretion is consistent with the trial justice's duty to ensure that witnesses are dealt with fairly.¹⁴⁶

Additional concerns arise during the cross-examination of the defendant. An improper cross-examination of the defendant can destroy the necessary appearance of fairness in a trial.¹⁴⁷ While the prosecutor is entitled to conduct a vigorous cross-examination of the defendant, there is no reason why a skillful, probing, cross-examination cannot be conducted with some measure of respect for the witness.¹⁴⁸ The following transgressions, alone or cumulatively, may render a cross-examination of the defendant abusive and unfair, and should be avoided:

- sarcastic questioning;¹⁴⁹
- expressing personal opinions about the evidence in the case;¹⁵⁰
- expressing personal opinions about the veracity of other witnesses;¹⁵¹
- asking the defendant to comment on the veracity of prosecution witnesses, or explain why another witness would be lying;¹⁵²
- expressing disbelief in the defendant's evidence;¹⁵³
- suggestions that the defendant has been suspected of other offences;¹⁵⁴ and

143 *R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193 at 195 (Ont. C.A.).

144 *R. v. Farjoy* (1985), 21 C.C.C. (3d) 312 at 316-317 (S.C.C.).

145 *R. v. Bourassa* (1991), 67 C.C.C. (3d) 143 at 146-147 (Que. C.A.); *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.).

146 *R. v. Rowbotham* (1977), 2 C.R. (3d) 293 at 299 (Ont. Co. Ct.); *R. v. Varga* (1994), 90 C.C.C. (3d) 484 at 498-499 (Ont. C.A.).

147 *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.).

148 *R. v. Logiaccio* (1984), 11 C.C.C. (3d) 374 at 383-384 (Ont. C.A.).

149 *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 at 176-77 (Ont. C.A.).

150 *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 at 178 (Ont. C.A.).

151 *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 at 335 (S.C.C.), (improper for Crown Counsel to comment upon veracity of Crown witnesses during jury address).

152 *Markadonis v. R.* (1935), 64 C.C.C. 41 (S.C.C.); *R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193 at 195-196 (Ont. C.A.); *R. v. Logiaccio* (1984), 11 C.C.C. (3d) 374 at 383 (Ont. C.A.); *R. v. S.(W.)* (1994), 90 C.C.C. (3d) 242 at 252 (Ont. C.A.), leave to appeal ref'd 93 C.C.C. (3d) vi ("there is no onus on an accused person to explain away the complaints against him or her").

153 *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 at 336 (S.C.C.).

154 *R. v. Logiaccio* (1984), 11 C.C.C. (3d) 374 at 381 (Ont. C.A.).

- engaging the defendant in argument.¹⁵⁵

The impact of the preceding transgressions upon the fairness of the defendant's trial, alone or cumulatively, depends upon the circumstances of the particular case. In assessing whether the cross-examination of the defendant was improper and prejudicial, a reviewing court may consider the nature of the defendant's defence,¹⁵⁶ the defendant's conduct at trial, and whether the defendant's agent or counsel objected to the questioning.¹⁵⁷

Furthermore, it must be emphasized that many of the principles regarding the trial justice's duty to limit improper cross-examination of the defendant were developed in the jury trial context, where concerns related to belittling or prejudicing the defendant in the eyes of the trier of fact are heightened.

c. Duty to Ask Questions

A trial justice may in some circumstances intervene during the examination of a witness, and even ask questions.¹⁵⁸ The discretion to ask questions, however, is not without limits. The conflicting duties of the trial justice are most apparent when he or she must decide whether to intervene to ask questions. The following passage from *R. v. Torbiak* illustrates this tension:

The proper conduct of a trial judge is circumscribed by two considerations. On the one hand his position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial Judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions. On the other hand his responsibility for the conduct of the trial may well require him to ask questions which ought to be asked and have not been asked on account of the failure of counsel, and so to compel him to interject himself into the examination of witnesses to a degree which he might not otherwise choose.

Since the limits of the allowable conduct are not absolute, but relative to the facts and circumstances of the particular trial within which they are to be observed, every alleged departure during a trial from the accepted standards of judicial conduct

¹⁵⁵ *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 at 178 (Ont. C.A.).

¹⁵⁶ *R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193 at 195-196 (Ont. C.A.).

¹⁵⁷ *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 at 180 (Ont. C.A.); *R. v. Varga* (1994), 90 C.C.C. (3d) 484 at 498-499 (Ont. C.A.), (Trial justice was entitled to rely on Crown counsel, who was familiar with issues in case, to challenge the cross-examination if unduly prejudicial).

¹⁵⁸ *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 198 (S.C.C.).

must be examined with respect to its effect on the fairness of the trial.¹⁵⁹

A trial justice has a duty to ask a witness questions to:

- clear up ambiguities in a witness' testimony;
- resolve a possible misunderstanding of any question by a witness;
- explore some matter which the witness' answers have left vague; or
- to put questions that should have been asked to bring out some relevant matter.¹⁶⁰

Additionally, the trial justice may warn or caution a witness who is obviously trying to avoid testifying, or being difficult.¹⁶¹

Special concerns arise where the trial justice questions the defendant. The appearance of fairness may be compromised when the trial justice asks questions of any witness, and in particular, the defendant.¹⁶² Accordingly, the trial justice should exercise prudence and restraint when questioning the defendant.¹⁶³

Additionally, a trial justice should avoid expressing disbelief in a witness' evidence while examining a witness. To do so may indicate that the trial justice has prejudged the case, "which compromises the appearance of justice which is essential to a fair trial."¹⁶⁴

In the end, "although the justice may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is seen to be done. It is all a question of manner."¹⁶⁵

d. Discretion to Call Witnesses

The trial justice has a limited discretion to call witnesses during a trial. This discretion should be exercised only in the rarest of cases where calling the witness is essential to ensuring the fairness of the trial.¹⁶⁶ The trial justice's discretion to call witnesses was

159 *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 at 230-231 (Ont. C.A.).

160 *R. v. Valley* (1986), 26 C.C.C. (3d) 207 at 230 (Ont. C.A.); *R. v. W.(A.)* (1994), 94 C.C.C. (3d) 441 at 447 *per* Brooke J.A., (Ont. C.A.) dissenting, *rev'd* (1995), 102 C.C.C. (3d) 96 (S.C.C.), for the reasons of Brooke J.A., dissenting; *R. v. Darlyn* (1946), 88 C.C.C. 296 at 277 (B.C. C.A.); *R. v. McKitka* (1982), 66 C.C.C. (2d) 164 at 168 (B.C. C.A.).

161 *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 198 (S.C.C.).

162 *R. v. W.(A.)* (1994), 94 C.C.C. (3d) 441 (Ont. C.A.).

163 *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 199 (S.C.C.).

164 *R. v. Sherry* (1995), 103 C.C.C. (3d) 276 at 279 *per* Laskin J.A., (Ont. C.A.) *rev'd* on other grounds (1996), 110 C.C.C. (3d) 160 (S.C.C.).

165 *Brouillard v. R.* (1985), 17 C.C.C. (3d) 193 at 199 (S.C.C.).

166 *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at 532 (S.C.C.); *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 502 (S.C.C.).

discussed by Cory J., writing for the majority, in *R. v. Finta*:

It has long been recognized in Canada and in England that in criminal cases a trial judge has a limited discretion to call witnesses without the consent of the parties. This step may be taken if, in the opinion of the trial judge, it is necessary for the discovery of truth or in the interests of justice. This discretion is justified in criminal cases because "the liberty of the accused is at stake and the object of the proceedings is to see that justice be done as between the accused and the state": Sopinka, Lederman and Bryant, *Law of Evidence* (1992), p. 826.

The discretion should only be exercised rarely and then with extreme care, so as not to interfere with the adversarial nature of the trial procedure or prejudice the accused. It should not be exercised after the close of the defence case, unless the matter was one which could not have been foreseen: [citations omitted].¹⁶⁷

Cory J. also noted in *Finta* that the discretion to call a witness may be exercised in the following circumstances:¹⁶⁸

- The trial judge may call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion this course is necessary in the interest of justice: [citations omitted];
- The right to call a witness after the close of the case of the defence should normally be limited to a case where a matter was one which could not have been foreseen;
- A witness may be called after the close of the defence not in order to supplement the evidence of the prosecution but to ascertain the truth and put all the evidence before the jury;
- The trial judge may not exercise his right to call a witness after the jury has retired, even at the request of the jury;
- In a non-jury case, in the absence of special circumstances, it is wrong to allow new evidence to be called once a trial judge has retired, and probably after the defence has closed its case;
- A judge ought not to exercise his discretion to call a witness if the defence would in no way be prejudiced by calling the witness. The defence should not

¹⁶⁷ *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at 529-530 (S.C.C.).

¹⁶⁸ *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at 530 (S.C.C.).

be permitted in this way to use the judge to call their witness to give him a greater appearance of objectivity; and

- The calling of the witness after the defence has closed its case is a factor which may be taken into account on appeal.

Additional factors that may be considered by the trial justice in deciding to call a witness him or herself include whether the tactical disadvantage suffered by a defendant who must call a potentially hostile witness would be "manifestly unfair,"¹⁶⁹ and whether the failure of the prosecutor to call a witness will result in prejudice to the defendant due to the resulting loss in choice to address the trial justice last.¹⁷⁰

e. Duty to Assist Unrepresented Defendant

Where the defendant is unrepresented by counsel or agent, one of the three essential pillars supporting a fair trial is absent, distorting the balance of the adversarial system. In the absence of counsel or agent for the defendant, the trial justice's duty to ensure that the defendant has a fair trial is enhanced.¹⁷¹ What is required to ensure that the defendant receives a fair trial varies with the circumstances of each case, and may require the trial justice to become a more active participant in the trial process. This may include providing the defendant with advice with respect to the conduct of the trial, and where it is apparent that the defendant is unable to do so adequately, assisting or taking over the examination and cross-examination of witnesses¹⁷² to ensure the defendant's position is adequately presented to the court.¹⁷³

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.¹⁷⁴

The trial justice must, however, avoid becoming the advocate of the unrepresented

¹⁶⁹ *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 496-497 (S.C.C.).

¹⁷⁰ *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at 533 (S.C.C.); *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 497-498 (S.C.C.).

¹⁷¹ *R. v. Bertoli* (1927), 47 C.C.C. 351 (B.C. C.A.), aff'd (1927), 48 C.C.C. 118 (S.C.C.).

¹⁷² *R. v. Manhas* (1980), 17 C.R. (3d) 331 (B.C.C.A.).

¹⁷³ *R. v. Darlyn* (1946), 88 C.C.C. 269 at 272 and 277 (B.C. C.A.).

¹⁷⁴ *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347 (Ont. C.A.).

defendant.¹⁷⁵ Extensive intervention in the trial process on behalf of an unrepresented defendant is inconsistent with the trial justice's role as neutral arbiter. This is clear from the following passage in *R. v. Taubler*.

While it is undoubtedly true that a trial judge has a duty to see that an unrepresented accused person is not denied a fair trial because he is not familiar with court procedure, the duty must necessarily be circumscribed by what is reasonable. Clearly it cannot and does not extend to his providing to the accused at each stage of his trial the kind of advice that counsel could be expected to provide if the accused were represented by counsel. If it did, the trial judge would quickly find himself in the impossible position of being both advocate and impartial arbiter at one and the same time.¹⁷⁶

Accordingly, extensive intervention and participation during the cross-examination of prosecution witnesses may constitute reversible error. While a trial justice certainly has a duty to assist an unrepresented defendant with his or her defence, the trial justice should avoid conducting an extensive and thorough cross-examination that would be expected from defence counsel or agent.¹⁷⁷ The trial justice's cross-examination of a witness should be moderate, and not to such a degree that it betrays a pre-disposition toward one party or the other.¹⁷⁸

4.3 Fault

4.3.1 Fault (*Mens Rea*) Generally

Fault, or *mens rea*, refers to the guilty mind or wrongful intention of the defendant.¹⁷⁹ In some cases to be found guilty of an offence, it must be proved that the defendant acted with the requisite wrongful intention when the prohibited act was committed. The statutory provision or Act that creates the offence defines the requisite fault element.

In *R. v. Theroux*, McLachlin J. speaking for the majority held that typically, *mens rea* is concerned with the consequences of the prohibited act.¹⁸⁰ The function served by *mens rea* is to prevent the conviction of the morally innocent. Thus, it must be shown that the

¹⁷⁵ *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 349 (Ont. C.A.).

¹⁷⁶ *R. v. Taubler* (1987), 20 O.A.C. 64 at 71; See also *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 349 (Ont. C.A.).

¹⁷⁷ *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 at 191 (Ont. C.A.).

¹⁷⁸ *R. v. Darlyn* (1946), 88 C.C.C. 269 at 277 (B.C. C.A.).

¹⁷⁹ *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 at 458 (S.C.C.).

¹⁸⁰ *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 at 458 (S.C.C.).

defendant understood and intended the consequences of his or her actions.

4.3.2 The Nature of Regulatory Offences

Regulatory offences, although quasi-criminal in nature, are the government's means of regulating what is essentially socially desirable conduct. The aim of a regulatory regime is not to punish morally reprehensible conduct but rather, penalties imposed for violations of regulatory statutes have the utilitarian purpose of preventing future harm to others.¹⁸¹

Most provincial regulatory offences are presumed to be strict liability offences, unless the language of the offence creating statute indicates otherwise.¹⁸²

Note that for strict liability offences, the prosecutor need only prove commission of the prohibited act, and that the defendant committed the act, both beyond a reasonable doubt. Upon satisfying this burden, the fault element is presumed; the defendant is deemed to have been negligent. The onus then shifts to the defendant to prove, on a balance of probabilities, that he exercised due diligence in the circumstances.

4.3.3 Strict and Absolute Liability

a. Generally

All offences possess a fault or mental element. The proof necessary to establish the mental element of an offence, however, varies, depending upon the context and purpose for which the offence was enacted. In *R. v. City of Sault Ste. Marie*, Dickson C.J.C., writing for the court, discussed the three categories of offences based upon the mental element required for conviction:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

¹⁸¹ *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 237-238 (S.C.C.).

¹⁸² *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373-375 (S.C.C.); *R. v. Nickel City Transport (Sudbury) Ltd.* (1993), 82 C.C.C. (3d) 541 at 556-557 (Ont. C.A.).

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.¹⁸³

b. Strict Liability

The fault element for a strict liability offence is simple negligence. A strict liability offence requires the prosecutor to prove the prohibited act beyond a reasonable doubt. Upon proof of the prohibited act, the fault element of negligence is presumed. The onus then shifts to the defendant to establish on a balance of probabilities that he or she acted with due diligence in the circumstances. This onus may be satisfied by evidence that the defendant took all reasonable steps in the circumstances, or was operating under a mistake of fact.¹⁸⁴

¹⁸³ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (at 373-375S.C.C.).

¹⁸⁴ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373-374 (S.C.C.); *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 at 343-344 (S.C.C.).

Imposing a burden upon the defendant to disprove his or her guilt on a balance of probabilities represents a fair half-way house between requiring the prosecutor to prove "full *mens rea*," and imposing a fault element of absolute liability upon the defendant. On the one hand, it is a "virtual impossibility in most regulatory cases" to prove wrongful intention. "In the normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence."¹⁸⁵ On the other hand, the defence of due diligence does not "seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever."¹⁸⁶

(i) Constitutional Validity of Strict Liability Offences

Broadly stated, strict liability offences enacted in the regulatory context do not offend section 7 of the *Charter*. Strict liability offences do, however, offend the presumption of innocence guaranteed by section 11(d) of the *Charter*. Whether a particular strict liability offence constitutes a reasonable limit that can be demonstrably justified in a free and democratic society must be determined on a case-by-case basis.

(1) Section 7 - Fundamental Justice

It is a principle of fundamental justice that the penalty imposed upon a defendant and the stigma that attaches to the conviction requires a level of fault which reflects the particular nature of the crime.¹⁸⁷ The fault element for strict liability offences is negligence. In *R. v. Wholesale Travel* it was held that the stigma attached to a conviction for false/misleading advertising does not warrant imposition of a level of fault higher than negligence.¹⁸⁸ In the context of regulatory offences, imposition of liability on the basis of negligence does not infringe section 7 *Charter*. Actors in a regulated field are taken to know and accept that imposition of an objective standard of conduct is a pre-condition to participation in the regulated field. Moreover, the difficulty proving actual intent or *mens rea* in a prosecution for a regulatory offence militates against a fault element higher than negligence.

(2) Section 11(d) - Presumption of Innocence

Imposing a burden upon the defendant to disprove his or her guilt on a balance of

¹⁸⁵ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373 (S.C.C.).

¹⁸⁶ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373 (S.C.C.).

¹⁸⁷ *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 at 133 (S.C.C.); *Reference Re. s.94(2), Motor Vehicle Act (British Columbia)* (1985), 23 C.C.C. (3d) 289 (S.C.C.);

R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 at 211 (S.C.C.).

¹⁸⁸ *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 213-214 (S.C.C.).

probabilities violates section 11(d) of the *Charter* because it permits a defendant to be convicted despite the existence of a reasonable doubt on an essential element of the offence.¹⁸⁹

With strict liability offences, the defendant's negligence is presumed upon proof of the prohibited act. To avoid a finding of guilt, the defendant must satisfy a legal burden by adducing evidence sufficient to disprove his or her guilt on a balance of probabilities. In these circumstances, it is possible that the evidence adduced by the defendant will be sufficient to raise a reasonable doubt, but nevertheless falls short of disproving negligence on a balance of probabilities. Thus, the defendant would be convicted despite the existence of a reasonable doubt, violating the presumption of innocence.

However, a strict liability offence may be a reasonable limit within the meaning of section 1 of the *Charter*. In *R. v. Wholesale Travel*, the Supreme Court of Canada, by a 5-4 majority, held that although the strict liability offence of false or misleading advertising infringed section 11(d), it was saved by section 1.

Iacobucci J. wrote a separate concurring judgment. He noted that in the context of "public welfare offences", the objective of "avoiding the loss of convictions because of evidentiary problems which arise because the relevant facts are particularly in the knowledge of the accused" is of sufficient importance to warrant overriding section 11(d).¹⁹⁰ With respect to the requirement that the means chosen limit the right protected by the *Charter* no more than necessary, he observed that the alternative of casting merely an evidential burden upon a defendant to raise a reasonable doubt as to due diligence would not allow the government to satisfactorily pursue its regulatory objective. Iacobucci J. echoed the sentiments of Dickson C.J.C. in *Sault Ste. Marie* when he noted that requiring the prosecutor to prove facts "largely within the peculiar knowledge of the accused" would in practice make it virtually impossible for the Crown to prove public welfare offences.

c. Absolute Liability

For absolute liability offences, the prosecutor must only prove the commission of the prohibited act beyond a reasonable doubt. Proof of a fault element is not necessary. Once the prohibited act has been proved, "it is not open to the accused to exculpate

189 *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 221-222 (S.C.C.). See, also, the following cases regarding the constitutionality of presumptions: *R. v. Whyte* (1988), 42 C.C.C. (3d) 97 at 109-110 (S.C.C.); *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 at 135 (S.C.C.); *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (S.C.C.).

190 *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 266 (S.C.C.).

himself by showing that he was free of fault." ¹⁹¹ In effect, the fault element is irrefutably presumed upon proof of the prohibited act.

The language of an offence creating provision must make it clear that liability is to be imposed merely upon proof of the prohibited act before the court will find an offence to be one of absolute liability. ¹⁹²

(i) Constitutional Validity of Absolute Liability Offences

The constitutional validity of absolute liability offences was considered in *Reference re: s. 94(2) Motor Vehicle Act*. Lamer J. (as he then was) wrote the following:

[I]n penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the *Charter* if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.

In this latter regard, something might be added.

Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like. ¹⁹³

Absolute liability offences always violate the principles of fundamental justice, including the presumption of innocence. However, only if an absolute liability offence has the potential to deprive life, liberty and security of the person will section 7 be violated. ¹⁹⁴ Imprisonment, including probation orders, jeopardize a defendant's liberty interest. ¹⁹⁵ Thus, "the combination of imprisonment and

¹⁹¹ *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373-375 (S.C.C.).

¹⁹² *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 375 (S.C.C.); *R. v. Nickel City Transport (Sudbury) Ltd.* (1993), 82 C.C.C. (3d) 541 at 556-557 (Ont. C.A.).

¹⁹³ Reference re: s. 94(2) of the *Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 313 (S.C.C.).

¹⁹⁴ Reference re: s. 94(2) of the *Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 311 (S.C.C.).

¹⁹⁵ Reference re: s. 94(2) of the *Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 311 (S.C.C.).

absolute liability violates s. 7 of the *Charter* and can only be salvaged if the authorities demonstrate under s. 1 that such deprivation of liberty "is a justified reasonable limit."¹⁹⁶

A separate issue is whether the possibility of imprisonment for non-payment of a fine imposed upon conviction for an absolute liability offence violates section 7. The Supreme Court of Canada in *Reference re: s. 94(2) Motor Vehicle Act*¹⁹⁷ and *Pontes*¹⁹⁸ specifically declined to address this issue. However, in *R. v. Nickel City Transport*, Arbour J.A. in a separate concurring judgment held absolute liability combined with the possibility of imprisonment upon default of payment of a fine "that does not address inability to pay," infringes the liberty interest protected by section 7.¹⁹⁹

(ii) Defences to Absolute Liability Offences

The defences of automatism,²⁰⁰ duress, insanity and extreme intoxication²⁰¹ may be available to a defendant charged with an absolute liability offence. All of these defences are related to the volitional nature of the *actus reus*, or the act prohibited, by an offence. An act must be voluntary in order for the *actus reus* of an offence to exist.²⁰²

The defence of mistake of fact is not available for an absolute liability offence.²⁰³ Mistake of fact is one of two branches of the due diligence defence to strict liability offences. Mistake of fact is concerned with the *mens rea*, or fault element of an offence. For absolute liability offences, proof of *mens rea* or fault is not required. So, with respect to the absolute liability offence of speeding, for example, a defendant can not rely on the fact that his speedometer was not working.²⁰⁴

4.3.4 Subjective versus Objective Fault

A subjective fault element requires the prosecutor to prove that the defendant subjectively had the requisite guilty knowledge or intention to bring about the prohibited act.

196 Reference re: s.94(2) of the *Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 311 (S.C.C.).

197 Reference re: s.94(2) of the *Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 311-312 (S.C.C.).

198 *R. v. Pontes* (1995), 100 C.C.C. (3d) 353 at 363 (S.C.C.).

199 *R. v. Nickel City Transport (Sudbury) Limited* (1993), 82 C.C.C. (3d) 541 at 573 (Ont. C.A.). See also *R. v. Burt* (1987), 38 C.C.C. (3d) 299 (Sask. C.A.). Note that s. 69(14) POA provides that before imprisonment in lieu of payment of a fine is imposed, the justice must be satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time.

200 See *R. v. Parks* (1992), 75 C.C.C. (3d) 287 at 302 (S.C.C.).

201 See *R. v. Daviault* (1994), 93 C.C.C. (3d) 21 (S.C.C.).

202 *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 at 458 (S.C.C.).

203 *R. v. Hickey* (1976), 30 C.C.C. (2d) 416 at 416 (Ont. C.A.); *R. v. Gillis* (1974), 18 C.C.C. (2d) 190 (N.S.C.A.).

204 *R. v. Hickey* (1976), 30 C.C.C. (2d) 416 at 416 (Ont. C.A.).

In contrast, an objective fault element only requires proof that a reasonable person in the defendant's position at the time of the offence would have had the requisite guilty knowledge, or would have acted differently. The reasonable person for the purpose of this analysis is the "reasonably prudent person,"²⁰⁵ qualified only by an extreme incapacity possessed by the defendant which prevents him or her from appreciating the risk or nature of his or her conduct.²⁰⁶ An objective fault element, in effect, imposes liability upon proof of negligence.

Where an offence requires proof of subjective *mens rea*, proof of mere negligence will not suffice in order to establish liability.²⁰⁷ However, in determining whether the defendant possessed subjective *mens rea*, the court is entitled to consider what the reasonable person would have thought in the circumstances presented to the defendant. Evidence of the defendant's mental state must be inferred from the surrounding circumstances. The following passage from *R. v. Buzzanga* is instructive:

Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them. The greater the likelihood of the relevant consequences ensuing from the accused's act, the easier it is to draw the inference that he intended those consequences. The purpose of this process, however, is to determine what the particular accused intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances, where doubt exists as to the actual intention of the accused.²⁰⁸

4.4 Compelling the Appearance of the Defendant

4.4.1 Witnesses

Where a justice is satisfied that a person is able to give material evidence in a proceeding, the justice may issue a summons requiring their attendance.²⁰⁹ A person who receives a summons is required to attend at the time and place stated and, if required by the

205 *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 at 391 (S.C.C.).

206 *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 at 388, 392-393 (S.C.C.).

207 *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 362 (S.C.C.).

208 *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 at 387 (Ont. C.A.).

209 Section 39(1) POA

summons, shall bring with him or her anything in his or her control or possession relating to the proceeding.²¹⁰

The summons shall be served personally by a provincial offences officer.²¹¹ If the person can not conveniently be found the officer shall leave the summons for the person at their last known address or usual place of abode with a person who appears to be at least sixteen.²¹²

Failure to comply with a summons can result in arrest pursuant to section 40(1) and prosecution pursuant to subsection 42(1).

Section 40(1) provides that a judge may issue a warrant for the arrest of a person where he or she is satisfied that a person who is able to give material evidence will not attend if a summons is served or where attempts to serve a summons have been made and failed because the person is evading service.

Where a police officer arrests a person under a warrant mentioned above they shall take the person before a justice who shall release the person on recognizance unless the justice is satisfied that it is necessary to detain the person to ensure their attendance.²¹³

4.4.2 The Defendant

Notwithstanding sections 50(1) and 82 of the *POA* which provide that a defendant may appear and act personally or by counsel or agent, the court has jurisdiction to exercise its discretion to require the personal attendance of the defendant pursuant to section 51. Section 51 provides as follows:

s. 51 Although a defendant appears by counsel or agent, the court may order the defendant to attend personally, and, where it appears to be necessary to do so, may issue a summons in the prescribed form.

Section 51 only applies where the defendant is represented by counsel or an agent.²¹⁴

Failure to comply with the summons may result in the issuing of an arrest warrant under subsection 54(1) or prosecution under subsection 42(1).

²¹⁰ Section 39(3) *POA*.

²¹¹ Section 26(2) *POA*.

²¹² Section 26(2) *POA*.

²¹³ Section 40(3) and (4).

²¹⁴ *R. v. Shears* (July 4, 1997), Doc. 4440/97 (Ont. Gen. Div.).

Section 51 has been interpreted to grant the court authority to order a defendant to remain in court for sentencing.²¹⁵

4.5 Organizing the Docket and Calling the List

4.5.1 Introduction

There are no provisions in the *POA* which govern organization of the docket and calling the list. The prosecutor has sole discretion to determine the order in which matters are heard by the court. The suggestions that follow are based on the practices of experienced prosecutors which have helped them to run an organized and efficient courtroom.

4.5.2 Organizing the Docket

On a typical day, a provincial offences prosecutor may have carriage of between 10 and 50 matters. The volume of matters emphasizes the need for sound organization and preparation before entering the courtroom.

A court day is divided into tiers. For each tier, there is a list of scheduled matters called the docket.

For each matter on the docket, the prosecutor is provided with a prosecution brief. The contents of the brief varies depending upon the offence and jurisdiction, but all prosecution briefs in Part I matters will contain at the least a copy of the certificate of offence and the defendant's notice of trial. Additional items that may be included in the brief are: a copy of the investigating officer's notes; a synopsis of the prosecution's case; copies of witness statements or will-says; and an accident report.

The prosecutor should review all of the prosecution briefs for a tier before entering the courtroom for a number of purposes, which include:

- screening the charge to determine whether there is a reasonable prospect of conviction;
- determining whether disclosure requests, if any, have been satisfied;
- determining whether the charge is a suitable one for resolution discussions,

215 *Kramer v. Forgrave* (1989), 68 O.R. (2d) 414 (H.C.).

and the position to be taken by the prosecutor regarding resolution discussions;

- becoming familiar with the circumstances of the charge ("trial prep"); and
- organizing the docket in a manner that lends itself to the most expeditious and efficient resolution of matters on the docket.

The first three purposes for reviewing the docket are canvassed in Section 3 of this *Handbook*, "Pre-Trial Matters," and will not be discussed here. The focus in this section is upon the latter two purposes, trial preparation and organization of the docket.

Trial preparation involves reviewing the prosecution briefs to note both the content and location of important documents. For example, in some cases, the defendant will have given a statement to the investigating officer at the scene of the offence. The prosecutor will want to be aware of the contents of the statement for two reasons. First, the statement may provide significant incriminating evidence against the defendant. Second, in the event that the defendant's statement is not admitted on consent, the prosecutor will want to know both the content of and circumstances surrounding the taking of the statement in order to prove that the statement was given voluntarily.

A second example is a case in which the prosecution brief contains a copy of the defendant's driving record. The prosecutor will want to know the content of the defendant's driving record in order to make appropriate submissions regarding sentence in the event that the defendant is convicted of the offence charged. In both of the examples provided, the prosecutor will want to know both the substance of the document, and the location of the document to ensure that the prosecutor can quickly access the document if necessary.

Trial preparation also involves research, to ensure that both the presentation of evidence and submissions at the end of trial conform to the substantive requirements of the offence charged.

The prosecutor should aim to finish reviewing the prosecution briefs for a tier at least 30 minutes before the tier is scheduled to commence. Early preparation allows the prosecutor to open the courtroom early so that he or she may meet with the investigating officers and any witnesses to discuss the evidence in a particular case.

After meeting with prosecution witnesses, the prosecutor should also meet with defendants and briefly discuss the charges against them. Generally, the prosecutor

should ask defendants to come to the front of the courtroom one by one and ask how he or she intends to plead. The prosecutor may also engage in resolution discussions with defendant at this time.

4.5.3 Calling the List

After a review of the prosecution briefs, and meeting with both prosecution witnesses and defendants, the prosecutor is in a position to organize the list. The following list identifies the order in which matters are generally called:

- adjournments;
- guilty pleas;
- trials with civilian witnesses;
- trials with police witnesses only;
- withdrawals; and
- deemed not to disputes.

The prosecutor may also consider calling matters in which the defendant is represented at the beginning of the tier, as a courtesy to defence counsel or agent.

4.6 Motions and Applications

4.6.1 Introduction

Motions and applications are brought within the framework of an existing proceeding. Both motions and applications can be defined as a request to the court for a direction or order that something be done for the benefit of the applicant. The party who brings a motion is referred to as the "moving party," while the party who brings an application is called the "applicant." The justice that hears the motion or application may or may not be the justice who presides at the defendant's trial. Notice of the motion or application is usually required, although motions and applications may be heard without notice.

The *POA* provides for a variety of motions and applications. Examples of motions and applications include changing a trial date, amending the certificate of offence or a motion to quash the certificate of offence. A defendant may also bring an application for relief for

an alleged breach of his or her *Charter* rights. Applications for *Charter* relief are the topic of Chapter 7 of the Handbook.

4.6.2 Procedural and Evidential Requirements

Rule 7 of the *Rules of the Ontario Court of Justice in Provincial Offences Proceedings*²¹⁶ governs both the procedural and evidential requirements for motions and applications provided by the POA. The procedure for bringing a motion or application, and the evidence to be given in support, are identical.²¹⁷ For the sake of clarity, only the procedural and evidential requirements for motions are outlined in this part.

Rule 7 provides:

7. (1) An application provided for by the Act or these rules shall be commenced by notice of application.
- (2) A motion provided for by the Act or these rules shall be commenced by notice of motion.
- (3) There shall be at least three days between the giving of the notice of application or notice of motion and the day for hearing the application or motion.
- (4) An applicant or moving party shall file notice of application or notice of motion at least two days before the day for hearing the application or motion.
- (5) Evidence on an application or motion may be given,
 - (a) by affidavit;
 - (b) with the permission of the court, orally; or
 - (c) in the form of a transcript of the examination of a witness.
- (6) Upon the hearing of an application or motion and whether or not other evidence is given on the application or motion, the justice may receive and base his or her decision upon information the justice considers credible and trustworthy in the circumstances.
- (7) An application or motion may be heard without notice,
 - (a) on consent; or

216 R.R.O. 1990, Reg. 200 "Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings".

217 R.R.O. 1990, Reg. 200, Rule 7.

(b) where, having regard to the subject-matter or the circumstances of the application or motion, it would not be unjust to hear the application or motion without notice.

- (8) Subrules (2) to (5) do not apply in respect of a motion under section 66 of the Act.

Motions are commenced by notice of motion²¹⁸ served on the opposite party at least three days prior to the day for the hearing of the motion.²¹⁹ The notice of motion must be filed with the court at least two days prior to the date of the hearing,²²⁰ and should be accompanied by an affidavit of the moving party in support of the motion.²²¹

Alternatively, the court may permit the moving party to adduce oral testimony at the hearing, either in substitution for or to supplement his or her affidavit.²²² The trial justice hearing the motion may rely on hearsay evidence that he or she "considers credible or trustworthy in the circumstances."²²³

The Rules also permit a motion to be heard without notice, on consent of the opposing party,²²⁴ or where the court is satisfied that, given the reason that the moving party is seeking an adjournment, "it would not be unjust" to hear the motion without notice.²²⁵

4.6.3 Form and Consent of Notices of Motion / Application and Affidavits in Support

Rule 32 prescribes the form and content of the notices of motion and affidavit to be used in many of the motions and applications that are provided by the *POA*.

4.7 Challenges to the Certificate of Offence

Before the defendant pleads to a charge, he or she may move to quash the certificate of offence on the ground that it contains a defect apparent on its face.²²⁶ The power to

²¹⁸ R.R.O. 1990, Reg. 200, Rule 7(2).

²¹⁹ R.R.O. 1990, Reg. 200, Rule 7(3).

²²⁰ R.R.O. 1990, Reg. 200, Rule 7(4).

²²¹ R.R.O. 1990, Reg. 200, Rule 7(5)(a).

²²² R.R.O. 1990, Reg. 200, Rule 7(5)(b).

²²³ R.R.O. 1990, Reg. 200, Rule 7(6).

²²⁴ R.R.O. 1990, Reg. 200, Rule 7(7)(a).

²²⁵ R.R.O. 1990, Reg. 200, Rule 7(7)(b).

²²⁶ Pursuant to Section 36(1), a motion to quash must be brought before the defendant enters a plea, and thereafter only with leave of the court.

quash is limited to cases in which the application of sections 33 to 35 of the *Provincial Offences Act* (amendments and particulars) would fail to satisfy the ends of justice.²²⁷ If the motion is granted, the certificate of offence is a nullity and the charge dismissed.

Section 36 of the *Provincial Offences Act* provides the equivalent to s. 601(1) of the *Criminal Code*. It is appropriate to deal with the defendant's pre-trial motion challenging the validity of the law under which the defendant has been charged prior to plea being entered or determining whether there were defences on the merits of the case.²²⁸

Some examples where courts have ruled circumstances do not warrant quashing a certificate of offence or information are:

1. Defendant's name misspelled on the certificate of offence;²²⁹
2. Offence notice not signed;²³⁰
3. Incorrect section of the criminal code cited on the information;²³¹
4. Exact time and location of the offence not specified in the information;²³² and;
5. The use of abbreviations to denote a title of a statute on the certificate.²³³

4.8 Courts and Jurisdiction

Jurisdiction may refer to the territorial jurisdiction of the court to hear the matter or to the jurisdiction of the justice presiding.

4.8.1 Territorial Jurisdiction

29. (1) Territorial jurisdiction – Subject to subsection (2), a proceeding in respect of an offence shall be heard and determined by the Ontario Court (Provincial Division) sitting in the county or district in which the offence occurred.

(2) Idem – A proceeding in respect of an offence may be heard and determined in a county or district that adjoins that in which the offence occurred if,

²²⁷ Section 36 POA.

²²⁸ *R. v. Haldenby* (1994), 93 C.C.C. (3d) 249 (Ont. Ct.(Prov. Div.)).

²²⁹ *R. v. McGilvary* (May 1, 1981) Ont. H.C. (unreported).

²³⁰ *R. v. Elliott* (1981), 12 M.V.R. 35 (O.C.A.).

²³¹ *Kavanagh v. The Queen* (1988) 6 M.V.R. (2d) 198 (Sask. Q.B.).

²³² *R. v. Ryan* (1985), 31 M.V.R. 210 (Ont. H.C.). See also *R. v. Hudson* (1985), 34 M.V.R. 168 (Ont. H.C.).

²³³ *R. v. Lemieux* (1982), 15 M.V.R. 126 (O.C.A.).

- (a) the court holds sittings in a place reasonably proximate to the place where the offence occurred; and
- (b) the place of sitting referred to in clause (a) is named in the summons or offence notice.

(3) Transfer to the proper county - Where a proceeding is taken in a county or district other than one referred to in subsection (1) or (2), the court shall order that the proceeding be transferred to the proper county or district and may where the defendant appears award costs under section 60.

(4) Change of venue – Where, on the motion of a defendant or prosecutor made to the court at the location named in the information or certificate, it appears to the court that,

- (a) if would be appropriate in the interest of justice to do so; or
- (b) both the defendant and prosecutor consent thereto,

the court may order that the proceeding be heard and determined at another location in Ontario.

(5) Conditions – The court may, in an order made on a motion by the prosecutor under subsection (3) or (4), prescribe conditions that it thinks proper with respect to the payment of additional expenses caused to the defendant as a result of the change of venue.

(6) Time of order for change of venue – An order under subsection (3) or (4) may be made even if a motion preliminary to trial has been disposed of or the plea has been taken and it may be made at any time before evidence has been heard.

(7) Preliminary motions – The court at a location to which a proceeding is transferred under this section may receive and determine any motion preliminary to trial although the same matter was determined by the court at the location from which the proceeding was transferred.

(8) Delivery of papers – Where an order is made under subsection (3) or (4), the clerk of the court at the location where the trial was to be held before the order was made shall deliver any material in his or her possession in connection with the proceeding forthwith to the clerk of the court at the location where the trial is ordered to be held.

Subsections 29(1) and (2) provide that a proceeding shall be heard and determined by the court in the county or district where the offence occurred or in a court that is “reasonably proximate.” Where a motion is made and the court determines that it would be

appropriate in the interest of the justice, or both parties consent, the court may order that the proceeding be held in another jurisdiction.

4.8.2 Judicial Jurisdiction

30. (1) Justice presiding at trial – The justice presiding when evidence is first taken at the trial shall preside over the whole of the trial.

(2) When presiding justice unable to act before adjudication - Where evidence has been taken at a trial and, before making his or her adjudication, the presiding justice dies or in his or her opinion or the opinion of the Chief Judge of the Ontario Court (Provincial Division) is for any reason unable to continue, another justice shall conduct the hearing again as a new trial.

(3) When presiding justice unable to act after adjudication - Where evidence has been taken at a trial and, after making his or her adjudication but before making his or her order of imposing sentence, the presiding justice dies or in his or opinion or the opinion of the Chief Judge of the Ontario Court (Provincial Division) is for any reason unable to continue, another justice may make the order or impose the sentence that is authorized by law.

(4) Consent to change presiding justice – a justice presiding at a trial may, at any stage of the trial and upon the consent of the prosecutor and defendant, order that the trial be conducted by another justice and, upon the order being given, subsection (2) applies as if the justice were unable to act.

31. Retention of jurisdiction – The court retains jurisdiction over the information or certificate even if the court fails to exercise its jurisdiction at any particular time or the provisions of this Act respecting adjournments are not complied with.

A justice who starts a trial must preside until the matter is completed. Where a justice is unable to continue, another justice will be appointed and the matter will proceed as if it were a new trial. If all that remains is to impose sentence, a new justice may be appointed to conclude the matter by imposing sentence.

4.8.3 Limitation Period

A limitation is a period of time prescribed by the applicable statute or legislation beyond which a proceeding can not be commenced. The limitation period for proceedings commenced by way of certificate of offence is prescribed by subsection 3(1) *POA* and Rule 11 of R.R.O. 1990, Reg. 200. Subsection 3(1) *POA* provides:

3.(1) Certificate of Offence - In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence *may be commenced by filing a certificate of offence* alleging the offence in the office of the court.

R.R.O. 1990, Reg. 200, Rule 11 provides:

11. (1) The clerk of the court shall not accept for filing a certificate of offence more than seven days after the day on which the offence notice or summons was served unless the time is extended by the court.

The effect of subsection 3(1) and Rule 11 is to render null and void any proceeding commenced by certificate of offence in which the defendant was not served with an offence notice or summons within 30 days of the alleged offence. Note, however, that pursuant to subsection 76(2) *POA*, a justice of the Ontario Court of Justice may extend the time for service of the offence notice or summons, with the consent of the defendant.

4.9 Arraignment and Plea

4.9.1 Introduction

In proceedings commenced by way of certificate of offence, the defendant's first appearance in court is called the arraignment. The arraignment serves two purposes. The primary purpose is to formally inform the defendant of the charges or allegations against him or her. The secondary purpose is to ensure that all of the parties to the proceedings are aware of the subject matter of the proceedings.²³⁴

Section 45 of the *POA* governs the arraignment process in provincial offence matters.

45. (1) Taking of plea - After being informed of the substance of the information or certificate, the defendant shall be asked whether the defendant pleads guilty or not guilty of the offence charged therein.

(2) Conviction on plea of guilty - Where the defendant pleads guilty, the court may accept the plea and convict the defendant.

(3) Refusal to plead - Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.

(4) Plea of guilty to another offence - Where the defendant pleads not guilty of

²³⁴ *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 at 151 (Ont. C.A.).

the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty.

4.9.2 The Arraignment

Arraignment of the defendant is fairly straightforward. The prosecutor calls out the defendant's name in court and asks the defendant to come to the front of the courtroom. Once the defendant is before the trial justice, he or she is asked by the clerk of the court or the prosecutor to state his or her name for the record. The clerk of the court then informs the defendant of the substance of the certificate of offence.²³⁵ This is done by reading out the name of the offence and provision of the statute pursuant to which the defendant is charged, as stated on the certificate of offence and offence notice or summons. The clerk then asks the defendant whether she understands the charge against her.

The defendant is then asked how he or she wishes to plea.²³⁶ The defendant may plead guilty, not guilty, or the defendant may, with the consent of the prosecutor, plead guilty to another offence.²³⁷

Note that pursuant to section 50(1) POA, a defendant may appear and act personally or by counsel or agent. Where the defendant is represented by counsel or agent, his or her agent will be present when he or she is arraigned.

Another consequence of section 50(1) POA is the defendant need not be present for his or her trial. Counsel or agent may conduct a defence on behalf of the defendant in the defendant's absence. Where the defendant is not present for his or her trial, their counsel or agent may waive the arraignment and enter a plea on the defendant's behalf.

4.9.3 Plea of Guilty to Offence Charged

A guilty plea is a formal admission of guilt. It also constitutes a waiver of the defendant's right to require the prosecutor to prove the defendant's guilt beyond a reasonable doubt

235 Section 45(1) POA.

236 Section 45(1) POA.

237 Section 45(4) POA.

and related procedural safeguards.²³⁸

Pursuant to section 45(2) POA where the defendant pleads guilty to the offence charged, the trial justice "may accept the plea and convict the defendant." The section is permissive and the trial justice is not bound to accept the guilty plea. Whether a conviction will be entered following a guilty plea is a matter of discretion for the trial justice.²³⁹ The trial justice will exercise his or her discretion to enter a conviction if satisfied that:

- the guilty plea is valid, in the sense that it is voluntary, unequivocal and informed;²⁴⁰ and
- the circumstances of the defendant's alleged misconduct are proscribed by the offence which the defendant has been charged with.²⁴¹

a. *Validity of the Guilty Plea*

The defendant's guilty plea must be voluntary, unequivocal and informed.

(i) *Voluntary*

Voluntariness in the context of a guilty plea refers to the conscious and volitional decision of the defendant to "plead guilty for reasons which he or she regards as appropriate".²⁴² A guilty plea entered in open court is presumed to be voluntary unless the contrary is shown.²⁴³

Circumstances which, alone or in combination, may cast doubt upon the voluntariness of a guilty plea include:²⁴⁴

- whether the defendant was pressured in any way to enter a guilty plea;²⁴⁵

238 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 519 (C.A.); *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 182-183 (S.C.C.).

239 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 188-189 (S.C.C.).

240 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 182-183 (S.C.C.); *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at 52 (S.C.C.); *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 519 (C.A.).

241 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 182-183 (S.C.C.); *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 525 (C.A.).

242 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 520 (C.A.).

243 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 520 (C.A.).

244 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 520 (C.A.).

245 See *R. v. Rajaeeford* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Benlolo*, [1993] O.J. No. 2460 [unreported], (Ont. C.A.)(Q.L.) regarding propriety of trial justice's participation in plea negotiations. In *Rajaeeford* it was held that, although a justice may participate in plea negotiations, the trial justice must not exert improper pressure upon the defendant to plead guilty, and in particular, should not indicate to a defendant that the sentence imposed after a trial will be more severe than the sentence imposed after a guilty plea. In *Benlolo*, Brooke J.A. speaking for the court cited Recommendation 74 of the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions in holding that absent the consent of the prosecutor, the trial justice should not indicate to a defendant what sentence will be imposed if the defendant pleads guilty.

- whether a person in authority coerced or oppressed the defendant;²⁴⁶
- whether the defendant was offered a "plea bargain" or other inducement;
- whether the defendant was under the influence of alcohol or drugs when the plea was taken;²⁴⁷ and
- whether the defendant suffers from a mental disorder, or is of limited intelligence.

If the trial justice becomes aware that the defendant's guilty plea is not voluntary, for example, where the defendant pleads guilty on the advice of counsel notwithstanding that he or she does not admit an essential element of the offence,²⁴⁸ the trial justice should strike the plea and enter a plea of not guilty.

(ii) *Unequivocal*

The guilty plea must also be unequivocal. A defendant can not enter a qualified or conditional plea of guilty.²⁴⁹ The pleas available to a defendant pursuant to section 45 POA are guilty, or not guilty. Additionally, the defendant may enter one of the special pleas pursuant to section 11(h) of the *Charter*.

If the comments of the defendant reveal that he or she intends to qualify or modify his or her plea, or that he or she is uncertain about the plea, the trial justice should refuse to accept the guilty plea and enter a plea of not guilty. If the qualifying remarks are made after the guilty plea has been entered, the trial justice may strike the guilty plea, or the defendant may be permitted to withdraw his or her plea of guilty. Either may be done at any time before the imposition of sentence.²⁵⁰ After sentence is imposed, the justice is *functus officio*.²⁵¹

(iii) *Informed*

Finally, the guilty plea must be informed. A guilty plea is informed if the defendant is aware of the nature of the circumstances of the alleged offence, the effect of the guilty

246 *R. v. Rajaeeford* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.) (re. pressure from trial justice); *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 at 105 (Que. C.A.) (re. pressure from defence counsel).

247 *R. v. Kavanagh* (1955), 114 C.C.C. 378 at 379 (Ont. C.A.).

248 *R. v. K.(S.)* (1995), 99 C.C.C. (3d) 376 (Ont. C.A.).

249 *R. v. Lucas* (1983), 9 C.C.C. (3d) 71 at (Ont. C.A.); *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 at 360 (Ont. C.A.).

250 *R. v. Kavanagh* (1955), 114 C.C.C. 378 at 379 (Ont. C.A.); *R. v. Koop*, [1958] O.W.N. 394 at 394-395 (Ont. C.A.).

251 *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 (Ont. C.A.); *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.).

plea, and the consequences of conviction.²⁵² Although a trial justice does not have a positive obligation to conduct an inquiry to ensure that the defendant is aware of the consequences of his or her guilty plea in all cases,²⁵³ and particularly where the defendant is represented by counsel or agent,²⁵⁴ the trial justice should conduct an inquiry where it appears that the defendant does not fully appreciate the nature of the charge or the effect of his or her plea.²⁵⁵

With respect to the consequences of the guilty plea and conviction, the defendant must appreciate that a conviction will follow his or her plea, and must be aware of the potential penalty he or she faces.²⁵⁶ Note, however, that the defendant's dissatisfaction with "the way things turn out" or the sentence imposed does not entitle a defendant to withdraw a guilty plea on the basis that he or she was not informed.²⁵⁷

b. Factual Validity of the Plea

The trial justice has discretion whether to hear evidence in support of a guilty plea.²⁵⁸ The general practice, however, is for the trial justice to receive evidence or conduct an inquiry before a guilty plea is entered.²⁵⁹ If the trial justice chooses to hear evidence, he or she must be satisfied that the facts, as related by the prosecutor and admitted by the defendant, fit the offence that the defendant is charged with.

The prosecutor meets this onus by reading the circumstances surrounding the charge onto the record after the defendant enters a plea of guilty. After the prosecutor has related the Crown's version of the facts, the defendant will be given an opportunity either to accept the Crown's version, or to explain the facts. If the defendant does not accept an aggravating fact read onto the record by the prosecutor, the prosecutor has the onus of proving the existence of the aggravating factor beyond a reasonable doubt.²⁶⁰

If, after the process outlined, the trial justice is satisfied that the facts support the offence pled to, then a conviction will be registered. If the facts do not fit the alleged offence,²⁶¹ or

252 *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at 52 (S.C.C.); *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 519 (C.A.).

253 *Brosseau v. R.*, [1969] 3 C.C.C. 129 (S.C.C.); *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 188-189 (S.C.C.).

254 *R. v. Antoine* (1984), 40 C.R. (3d) 375 at 381 (Que. C.A.).

255 *Brosseau v. R.*, [1969] 3 C.C.C. 129 (at 137-138 S.C.C.).

256 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 523 (C.A.).

257 *R. v. Antoine* (1984), 40 C.R. (3d) 375 at 383 (Que. C.A.); *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at 53 (S.C.C.).

258 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 188 (S.C.C.).

259 *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 525 (C.A.).

260 *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514-516 (S.C.C.).

261 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 188-189 (S.C.C.).

the facts as related do not disclose an offence known to law,²⁶² the guilty plea will be struck out.²⁶³

4.9.4 Plea of Guilty to Another Offence

Section 45(4) POA permits the court to accept a plea of guilty to an offence other than the offence charged in the circumstances set out in section 45(4). The guilty plea to the substituted offence may be accepted regardless of whether the substituted offence is an included offence of the offence charged. Before the court may accept the plea, the following prerequisites must be satisfied:

- the defendant must plead not guilty to the offence charged;
- the defendant must plead guilty to the substituted offence; and
- the prosecutor must consent to the plea to the substituted offence.

Where these prerequisites are satisfied, the court may accept the defendant's plea of guilty to the other offence, amend the certificate of offence to reflect the substituted offence and enter a conviction.

It is important to emphasize that the guilty plea to the substituted offence under section 45(4) requires the consent of the prosecutor.²⁶⁴ A plea of guilty recorded without the consent of the prosecutor is a nullity.²⁶⁵ Thus, section 45 presents the trial justice presiding at the defendant's arraignment with three options: (1) enter a plea of not guilty; (2) accept the defendant's plea of guilty and enter a conviction; or (3) accept a plea of guilty to a substituted offence where the prosecutor consents. The power of the justice at the defendant's arraignment contrasts with the power of the justice at the conclusion of the trial to convict the defendant of an included offence, although the whole offence charged is not proved.²⁶⁶

Where the defendant pleads not guilty to the offence charged, but guilty to another offence without the consent of the prosecutor, the only plea that should be entered is the plea of not guilty to the original offence charged. A trial should then be held with respect to the original offence. At the trial, it is proper for the trial justice to consider the defendant's

262 *R. v. Grainger* (1978), 42 C.C.C. (2d) 119 at 120 (Ont. C.A.).

263 *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 188-189 (S.C.C.).

264 *R. v. Pentiluk and MacDonald* (1975), 28 C.R.N.S. 324 at 328 (Ont. C.A.).

265 *R. v. Pentiluk and MacDonald* (1975), 28 C.R.N.S. 324 at 328 (Ont. C.A.).

266 Section 55 POA.

guilty plea as an admission against interest.²⁶⁷

Note that, even where the prosecutor consents to the guilty plea to the substituted offence, the court is not compelled to accept the plea. Although the court should place great weight upon the prosecutor's consent to the plea to the substituted offence,²⁶⁸ the discretion to accept the plea lies with the court.²⁶⁹ Accordingly, if the court is not satisfied that the facts support a conviction for the substituted offence, the court may reject the plea and order a trial on the original offence charged.

In practice, the prosecutor should comply with the following steps when proceeding with a guilty plea to a substituted offence under section 45(4) of the *POA*. First, the prosecutor should ensure that the defendant is asked how he or she wishes to plea to the original charge, and that the defendant pleads not guilty to the original charge. Second, the prosecutor should acknowledge on the record that he or she consents to the plea of guilty to the substituted offence. Third, the trial justice should indicate that he or she accepts the plea of guilty to the substituted charge. After doing so, the justice should then amend the certificate of offence and enter a conviction. If these steps are followed in the order suggested, the hazard represented by the defendant who pleads not guilty to the substituted offence after the certificate of offence has been amended, and the incidental issue of whether a justice has the authority to further amend the certificate of offence to reflect the original offence charged, are avoided.

4.9.5 Imposition of Sentence Following Plea of Guilty to Offence Charged or Other Offence

After the conviction is entered, both parties are given the opportunity to make submissions on the issue of sentencing. The conduct of sentencing hearings is governed by section 57 of the *POA*, which is discussed in Chapter 5, "**Sentencing.**"

The justice who receives the defendant's guilty plea and registers the conviction must also conduct the defendant's sentencing hearing. The justice is "seized" of the matter once he or she commences an inquiry into the circumstances in support of the defendant's guilty plea, and a second justice may not sentence the defendant.²⁷⁰ The sentencing hearing may be conducted immediately following the conviction, or the matter may be adjourned to

²⁶⁷ *R. v. Dobson* (1985), 19 C.C.C. (3d) 93 at 95 (Ont. C.A.).

²⁶⁸ *R. v. Naraindeen* (1990), 75 O.R. (2d) 120 (Ont. C.A.).

²⁶⁹ *R. v. Pentiluk and MacDonald* (1975), 28 C.R.N.S. 324 at 328 (Ont. C.A.); *R. v. Naraindeen* (1990), 75 O.R. (2d) 120 (Ont. C.A.).

²⁷⁰ Section 30(1) *POA*; *R. v. Cataract* (1994), 93 C.C.C. (3d) 483 (Sask. C.A.).

another day for sentencing.

4.9.6 Plea of Not Guilty

Where the defendant enters a plea of not guilty to the offence charged, he or she will have a trial on the offence charged. This is clear from section 46(1), which provides:

46. (1) Trial on plea of not guilty – Subject to section 6, where the defendant pleads not guilty, the court shall hold the trial.

Additionally, where the defendant refuses to plead, or does not answer directly, a plea of not guilty shall be entered by the court and a trial will be held.²⁷¹ Once the trial commences, the defendant has the right to make full answer and defence.²⁷² Moreover, a defendant prosecuted for a provincial offence is entitled to the protection of all of the *Charter* rights attendant to the criminal process.²⁷³

4.9.7 Special Pleas – *Autrefois Acquit* and *Autrefois Convict*

a. Generally

A defendant charged with an offence for which he or she has already been acquitted or convicted may enter the special pleas of *autrefois acquit* or *autrefois convict*. If available in the circumstances of the case, the special pleas operate as a complete bar against prosecution for the offence charged.²⁷⁴ The offence for which the defendant was previously acquitted or convicted is *res judicata* and a second prosecution is precluded.²⁷⁵

The special pleas of *autrefois acquit* and *autrefois convict* reflect the general criminal law principle that no person should be put in jeopardy twice for the same matter.²⁷⁶ A defendant is placed in jeopardy once he or she is arraigned and enters a plea, the trial justice has jurisdiction to determine the matter and the prosecution is called upon to prove its case before the court.²⁷⁷

271 Section 45(3) *POA*. The text of section 45(3) is reproduced at the beginning of Section 4.9.1 of the Handbook.

272 Section 46(2) *POA*.

273 *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 at 400-401 (S.C.C.). Note the Provincial Offences Court is a court of competent jurisdiction to hear *Charter* motions, see *R. v. Vanbots Construction Corp.* (1996), 30 W.C.B. (2d) 47 (Ont. Ct. (Prov. Div.)).

274 *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 369-370 (S.C.C.).

275 *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 369-370 (S.C.C.); *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 at 173 (Ont. C.A.).

276 *Cullen v. R.* (1949), 94 C.C.C. 337 at 347 (S.C.C.); *R. v. Riddle* (1980), 48 C.C.C. (2d) 365 at 369 (S.C.C.).

277 *R. v. Hatherley* (1971), 4 C.C.C. (2d) 242 at 243 (Ont. C.A.); *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 379-380 (S.C.C.).

The special pleas may be sustained where the defendant establishes:

- the first charge was the subject of a final verdict, in the sense that he or she was finally acquitted or convicted of a substantially similar offence;²⁷⁸ and
- the substantially similar offence arose out of the same factual transaction currently before the court.²⁷⁹

With respect to the first requirement, the defendant is not placed in double jeopardy unless he or she was finally acquitted or convicted of the previous charge. Accordingly, the plea of *autrefois acquit* is not available in the following situations:

- where the previous certificate of offence was quashed prior to plea or on appeal. Until the defendant enters a plea, he or she is not in jeopardy of being convicted;²⁸⁰
- where the previous charge was dismissed or certificate quashed on the basis of lack of jurisdiction;²⁸¹
- where the previous charge was withdrawn;²⁸² and
- where the previous charge was stayed by the prosecutor.²⁸³

In contrast, the plea of *autrefois acquit* is available where the defendant entered a plea of not guilty at the first trial and the charge was dismissed after the prosecutor offered no evidence.²⁸⁴

With respect to the "substantially similar offence" requirement, the focus is upon the similarity of the charges giving rise to the multiple prosecutions, not the similarity of the facts underlying the charges.²⁸⁵

With respect to the second requirement, the term "same factual transaction" does not refer to two transactions having identical facts, but rather one transaction giving rise to multiple

278 *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.); *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 (Ont. C.A.).

279 *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 (Ont. C.A.).

280 *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 311-312 (S.C.C.); *R. v. Bedford* (1997), 116 C.C.C. (3d) 95 at 96 (S.C.C.). Note that where the proceedings were quashed after the defendant entered a plea, the plea of *autrefois acquit* is available if the same charge is relaid: *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 313 (S.C.C.).

281 *R. v. Petersen* (1982), 69 C.C.C. (2d) 385 at 392-393 (S.C.C.); *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 311-312 (S.C.C.).

282 *R. v. Selhi* (1990), 53 C.C.C. (3d) 576 (S.C.C.).

283 See *R. v. Tateham* (1982), 70 C.C.C. (2d) 565 (B.C. C.A.).

284 *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 379 (S.C.C.).

285 *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.).

charges.²⁸⁶ As just noted, the focus of the inquiry is not the similarity of the facts.²⁸⁷ Accordingly, multiple prosecutions under the same statutory provision are permissible if each prosecution relates to a separate transaction or act.²⁸⁸

b. Section 11(h) of the Charter

There is no provision in the *POA* which permits defendants charged with an offence to enter the special pleas of *autrefois acquit* or *autrefois convict*. Resort must be had to section 11(h) of the *Charter*. Section 11(h) of the *Charter* provides:

11. Any person charged with an offence has the right if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

Section 11(h), like all of the rights enumerated in section 11 of the *Charter*, applies to all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation.²⁸⁹

4.9.8 Issue Estoppel or Res Judicata

Like the special pleas of *autrefois acquit* and *autrefois convict*, the principle of issue estoppel or *res judicata* is based upon the fundamental common law rule that no person should be "vexed twice for the same cause."²⁹⁰ Additionally, both the special pleas and issue estoppel reflect the policy concerns that matters fully litigated between parties should not be reopened, and that conflicting decisions should be avoided.²⁹¹

The two principles, however, differ in the scope of their application. The doctrine of issue estoppel precludes parties to an action from relitigating in subsequent proceedings a particular question or issue that has been decisively determined in favour of one of the parties. In contrast, the special pleas preclude a party from relitigating a whole cause of action.²⁹²

286 *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 at 176 (Ont. C.A.).

287 *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 at 259 - 260 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.).

288 *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 at 178 (Ont. C.A.).

289 *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 at 400-403 (S.C.C.); *R. v. Shubley* (1990), 52 C.C.C. (3d) 481 (S.C.C.).

290 *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 at 265-266 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.).

291 *R. v. Duhamel* (1984), 15 C.C.C. (3d) 491 at 497 (S.C.C.).

292 *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 at 266 (Ont. C.A.), aff'd [1963] 3 C.C.C. 201 (S.C.C.).

The defence ²⁹³ of *issue estoppel* will apply where:

- both parties participated in the prior proceedings; ²⁹⁴ and
- a finding in favour of the defendant on the relevant issue is the only rational explanation for the prior verdict. ²⁹⁵

Note that issue estoppel only applies to issues fundamental to a verdict. ²⁹⁶ Consequently, to invoke the doctrine of *issue estoppel*, the onus is on the defendant to establish that an essential element of the charge before the court was conclusively determined in his or her favour at a prior proceeding. ²⁹⁷

4.9.9 The *Kienapple* Principle

The *Kienapple* ²⁹⁸ principle may operate to bar multiple convictions for different offences where the offences arise out of the same transaction. In *R. v. Prince* ²⁹⁹, the Supreme Court of Canada clarified the scope of the *Kienapple* principle. Before multiple convictions will be barred, the following prerequisites must be satisfied:

- There must be a factual nexus between the offences, *i.e.* the offences must arise out of the same transaction.
- There must be “sufficient proximity,” or a legal nexus between the offences themselves, *i.e.* the offences must share common elements. The sufficient proximity requirement will be satisfied only if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle. There is however, the following caveat. Where offences are of unequal gravity, *Kienapple* may bar a conviction for the lesser offence, notwithstanding that there are additional elements in the greater offence, if there are no distinct additional elements in the lesser offence.

²⁹³ *Issue estoppel* cannot be raised by the Crown: *R. v. Sunila and Solayman* (No. 2) (1986), 26 C.C.C. (3d) 462 at 466 (N.S. S.C. T.D.).

²⁹⁴ *R. v. Speid* (1985), 20 C.C.C. (3d) 534 at 556 (Ont. C.A.).

²⁹⁵ *R. v. Gushue* (1980), 50 C.C.C. (2d) 417 at 424 (S.C.C.).

²⁹⁶ *R. v. Duhamel* (1984), 15 C.C.C. (3d) 491 at 495-496 (S.C.C.).

²⁹⁷ *R. v. Handson* (1978), 43 C.C.C. (2d) 490 at 495-496 (Ont. C.A.).

²⁹⁸ *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.).

²⁹⁹ *R. v. Prince*, [1986] 2 S.C.R. 480.

- There are three situations where sufficient correspondence between elements will be found, or there is a sufficient legal nexus present, to preclude multiple convictions:
 - 1) Where an element of one offence is a particularization of essentially the same element in the other offence.³⁰⁰
 - 2) Where there is more than one method, embodied in more than one offence, to prove a single act or delict.³⁰¹
 - 3) Where Parliament or the Legislature has deemed a particular element to be satisfied on proof of another element.

Where the defendant is found guilty of multiple offences but the *Kienapple* principle applies, rather than enter acquittals, the trial justice should enter conditional stays on the charges which are barred by the rule against multiple convictions.³⁰² There are practical advantages to entering a conditional stay. If the defendant does not appeal his conviction for the more serious offence, or does appeal and is unsuccessful, the conditional stay becomes a permanent stay, which is tantamount to a judgment or verdict of acquittal for the purpose of a plea of *autre fois* acquit. If, on the other hand, an appeal from the more serious conviction is successful, the conditional stay dissolves and the appellate court can remit the matter back to the trial justice for a trial on the conditionally stayed offences,³⁰³ or enter a conviction for the conditionally stayed offences.³⁰⁴

4.9.10 Order of Dismissal

Where the prosecutor fails to appear for a trial, the court may dismiss the charges against the defendant.³⁰⁵ In the event of a dismissal, the defendant may request that the court draw up an order of dismissal.³⁰⁶ An order of dismissal constitutes a bar to any subsequent proceeding against the defendant in respect of the same matter. Section 53(4) POA provides:

300 Absent an indication in the offence creating legislation that there should be multiple convictions or added punishment in the event of overlap, see *Prince* at p. 501.

301 See for example *R. v. Gushue* (1980), 50 C.C.C. (2d) 417 (S.C.C.), where it was held that convictions for perjury and giving contradictory evidence in a judicial proceeding were precluded by the *Kienapple* principle, notwithstanding that both offences have different elements.

302 *R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417 (S.C.C.).

303 *R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417 (S.C.C.).

304 See Section 138 POA.

305 Section 53(1) and (2) POA.

306 Section 53(4) POA. Pursuant to R.R.O. 1990, Reg. 200 Rule 32(21), an order of dismissal shall be in Form 121.

53. (4) Written order of dismissal – Where a charge is dismissed under subsection (1) or (2), the court may, if requested by the defendant, draw up an order of dismissal stating the grounds therefore and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceeding against the defendant in respect of the same cause.

Drawing up an order of dismissal is an administrative act of the court.³⁰⁷ Consequently, after the charges are dismissed, the court is not *functus officio* for the purpose of drawing up the order.³⁰⁸

4.10 Adjournments

4.10.1 Generally

To adjourn a matter means simply to put off or delay the matter to another time or place. Adjournments of provincial offence matters are governed by section 49 of the *POA*, which provides:

49. (1) Adjournments – The court may, from time to time, adjourn a trial or hearing but, where the defendant is in custody, an adjournment shall not be for a period longer than eight days without the consent of the defendant.

(2) Early resumption – A trial or hearing that is adjourned for a period may be resumed before the expiration of the period with the consent of the defendant and the prosecutor.

(3) Adjournment – Despite subsection (1), if the trial is being held in respect of a proceeding commenced under Part I or II, the court shall not adjourn the trial for the purpose of having the provincial offences officer who completed the certificate attend to give evidence unless the court is satisfied that the interests of justice require it.

It is clear from the language of section 49(1) that the decision to grant an adjournment is a matter of discretion for the justice of the peace.³⁰⁹ To successfully challenge on appeal the refusal of a justice of the peace to grant an adjournment, it must be shown that the justice of the peace did not exercise his or her discretion judicially, or that refusal resulted

³⁰⁷ *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 375 (S.C.C.).

³⁰⁸ *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 at 375 (S.C.C.).

³⁰⁹ See also *R. v. Manhas*, [1980] 1 S.C.R. 591.

in an injustice.³¹⁰

Pursuant to the *Rules in Provincial Offences Proceedings*,³¹¹ motions for an adjournment are commenced by notice of motion³¹² served on the opposite party at least three days prior to the day for the hearing of the motion.³¹³ The notice of motion must be filed with the court at least two days prior to the date of the hearing,³¹⁴ and should be accompanied by an affidavit of the moving party in support of the motion.³¹⁵ Alternatively, the court may permit the moving party to adduce oral testimony at the hearing, either in substitution for or to supplement his or her affidavit.³¹⁶ The justice of the peace hearing the motion may rely on hearsay evidence that he or she "considers credible or trustworthy in the circumstances."³¹⁷

The Rules also permit a motion to be heard without notice, on consent of the opposite party,³¹⁸ or where the court is satisfied that, given the reason that the moving party is seeking an adjournment, "it would not be unjust" to hear the motion without notice.³¹⁹

Matters may be adjourned for a number of reasons and at any point during the proceedings. For example, if the court cures a defect in the certificate of offence through amendment,³²⁰ or orders that particulars be provided to the defendant,³²¹ the court may also order an adjournment to permit the defendant to adequately prepare to defend the charge as amended or particularized.³²² A similar situation arises where the defendant has not been provided with disclosure, or is first provided with disclosure on the trial date. An adjournment and disclosure order is commonly granted to remedy a breach of a defendant's right to disclosure.³²³ Additionally, a trial may be adjourned to permit the court to render a judgment. Post-conviction, sentencing may be adjourned to another

310 *R. v. Barrette* (1976), 29 C.C.C. (2d) 189 (S.C.C.); *R. v. Manhas*, [1980] 1 S.C.R. 591. In *Barrette*, Pigeon J. said the following (at 193): "It is true that a decision on an application for adjournment is in the Judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well-founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings".

311 R.R.O. 1990, Reg. 200 "Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings".

312 R.R.O. 1990, Reg. 200, Rule 7(2).

313 R.R.O. 1990, Reg. 200, Rule 7(3).

314 R.R.O. 1990, Reg. 200, Rule 7(4).

315 R.R.O. 1990, Reg. 200, Rule 7(5)(a).

316 R.R.O. 1990, Reg. 200, Rule 7(5)(b).

317 R.R.O. 1990, Reg. 200, Rule 7(6).

318 R.R.O. 1990, Reg. 200, Rule 7(7)(a).

319 R.R.O. 1990, Reg. 200, Rule 7(7)(b).

320 Section 34(1) POA.

321 Section 35 POA.

322 *R. v. Rogers (No. 1)* (1972), 6 C.C.C. (2d) 97 (P.E.I. S.C.). See also section 37, which permits the court to make an order for costs under section 60 where an adjournment is a necessary result of an amendment or order for particulars.

323 *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 41 (S.C.C.); *R. v. Queen's University at Kingston* (1997), 25 C.E.L.R. (N.S.) 310 (Ont. Ct. (Prov. Div.)).

day.

Adjournments are commonly sought to permit the attendance of necessary parties or witnesses. This is the focus of the remainder of this section.

4.10.2 To Permit Attendance of Defendant's Agent or Counsel

Where defence counsel or agent is unable to be present on the trial date, the defendant may move for an adjournment. An adjournment is regularly granted in these circumstances where the motion is brought in advance of the trial date. Consequently, the prosecutor should consider consenting to such a motion brought in advance of the trial date as a courtesy to the defendant's agent.

If the motion for adjournment is brought on the trial date without notice, the prosecutor generally should oppose the request. Not only have the rules for bringing a motion not been complied with, but also inconvenience caused to prosecution witnesses. However, where the defendant is not responsible for the agent's absence, an adjournment will most likely be granted. While neither the *POA* nor the *Charter* guarantees the right to be represented by counsel or agent at trial,³²⁴ the court will be reluctant to force a defendant to proceed to trial if his or her agent is absent through no fault of the defendant.³²⁵

An adjournment will likely be refused where the defendant is responsible for the agent's absence. The court may deny an adjournment where the defendant did not act diligently in attempting to retain an agent, or deliberately delayed or failed to retain counsel in an attempt to delay or stall the trial.³²⁶ Other factors that may be cited in denying an adjournment to retain counsel include maintenance of order in the administration of justice, and absence of prejudice to the defendant's right to make full answer and

324 *R. v. Robertson* (1983), 9 C.C.C. (3d) 404 (C.M.A.C.) (s. 10(b) of the *Charter* does not guarantee the right to counsel at trial); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) (s. 7 of the *Charter* may guarantee the right to counsel at trial where the defendant is charged with an indictable offence that is serious and complex). But see *R. v. McCallen* [1999] O.J. No. 202, (Ont. C.A.) [unreported]. (Q.L.) (s.10(b) of the *Charter* may be infringed by the refusal to grant a reasonable adjournment to permit the defendant's counsel of choice to attend).

325 *R. v. Barrette* (1976), 29 C.C.C. (2d) 189 (S.C.C.); *R. v. Beals* (1993), 126 N.S.R. (2d) 130 (N.S. C.A.). See also *R. v. Hill*, [unreported], [1987] O.J. No. 1935 (Ont. Ct. (Prov. Div.)) (Q.L.). The agent retained by the appellant/defendant's was "double booked" and sent an associate from "Points" to seek an adjournment. The adjournment was refused on the grounds that the motion was brought without notice although the agent had been aware for three weeks that he was double-booked. Following the refusal, the replacement agent indicated to the court that he was in a position to defend the appellant, and then stated "We are not going to offer any defence". The replacement declined to cross-examine any prosecution witnesses. The appellant's brief testimony revealed the potential for a defence on the merits. A new trial was ordered on the ground that, through no fault of the appellant's or the court's, but the conduct of the defendant's agent, the defendant was denied the right to make full answer and defence.

326 *R. v. Manhas* (1980), 17 C.R. (3d) 331 at 336 (B.C. C.A.), aff'd [1980] 1 S.C.R. 591; *R. v. Smith* (1989), 52 C.C.C. (3d) 90 at 93 (Ont. C.A.); *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 at 48 (Ont. C.A.); *R. v. Burt*, [unreported], [1993] O.J. No. 1217 (Ont. Ct. (Gen. Div.)) (Q.L.); *R. v. Beals* (1993), 126 N.S.R. (2d) 130 (N.S. C.A.).

defence.³²⁷

4.10.3 To Permit Attendance of the Defendant

Similarly, adjournments may be sought to permit the attendance of the defendant. The defendant may bring such motions prior to the trial date, or by agent on the trial date. Generally, the defendant should have a compelling reason supported by documentary evidence justifying her absence or inability to conduct the trial on the trial date. If so, the prosecutor may consent to an adjournment.

Note, however, that where the court does not grant an adjournment of the trial, the defendant may be deemed not to dispute the charge and a conviction entered in the defendant's absence.³²⁸

Additionally, where the defendant has chosen to appear by agent or counsel at trial, the matter may be adjourned where the circumstances of the case make it necessary that the defendant be present. While the defendant has the right to appear and act by counsel or agent,³²⁹ the court retains the jurisdiction to compel the defendant to attend personally.³³⁰ If such an order is made, the matter will be adjourned to allow the defendant to be present on the return date.

4.10.4 To Permit Attendance of Witnesses

On occasion, prosecution witnesses may not show up for the trial. If so, the defendant may move to have the charge against him or her dismissed, or the prosecutor may withdraw the charge, unless the prosecutor is granted an adjournment to permit the attendance of the absent witness.

Where a witness is not present in the courtroom at the time set for trial, before withdrawing a charge or responding to a motion to dismiss, the prosecutor ought to request that the matter be held down in the event that the absent witness is merely late.

³²⁷ *R. v. Johnson* (1973), 11 C.C.C. (2d) 101 at 106 (B.C. C.A.). But see *R. v. Shute* (1982), 66 C.C.C. (2d) 354 (N.S.S.C. A.D.), where it was held that a trial judge errs in the exercise of his discretion where he refuses to grant an adjournment pursuant to a fixed policy against granting adjournments of cases which had been scheduled for trial.

³²⁸ Section 9.1 POA.

³²⁹ Section 50(1) POA.

³³⁰ Section 51 POA.

If, however, it is apparent that the witness will not be attending court on the day set for trial, the prosecutor should seek leave of the court to bring a motion for an adjournment to permit the attendance of the witness.³³¹ To secure an adjournment for the attendance of witnesses, all of the following conditions must be met:

- the absent witness is a material witness in the case;
- the party seeking the adjournment has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of the witness; and
- there is a reasonable expectation that the witness can be procured at the future time to which it is sought to put off the trial.³³²

A justice of the peace can not dismiss a charge *ex proprio motu* (on his or her own motion) if a prosecution witness is absent. It is an error of law to refuse an adjournment request without giving the prosecutor an opportunity to show that an adjournment is justified in the circumstances.³³³ To do otherwise constitutes a failure to exercise his or her discretion judicially,³³⁴ and infringes the prosecutor's right to a fair trial.³³⁵ Good and sufficient reasons must be shown for a refusal based upon all facts relevant to the witness' absence.³³⁶

Additionally, the interests of the defendant are not the only factors to be considered on the motion. All adjournment requests involve a consideration of a number of interests, including society's interest in seeing a prosecution completed on its merits, and the interests of victims, if any.³³⁷ However, the relatively minor nature of offences prosecuted under Part I of the *POA* is a significant factor weighing against an adjournment and the attendant inconvenience to the defendant.³³⁸

With respect to the first requirement that the absent witness must be a material witness in the case, this requirement is *prima facie* satisfied by proof that a summons or subpoena has been issued for the witness. Issuance of a summons necessitates a finding that the

331 A motion for an adjournment without notice requires leave of the court, R.R.O. 1990, Reg. 200, Rule 7(7)(b).

332 *R. v. Darville* (1956), 116 C.C.C. 113 at 117 (S.C.C.).

333 *R. v. Darville* (1956), 116 C.C.C. 113 (S.C.C.); *R. v. Carvery* (1992), 110 N.S.R. (2d) 350 (N.S.S.C. A.D.); *R. v. Taylor* (1995), 142 N.S.R. (2d) 382 (N.S. C.A.), leave to appeal denied [1998], S.C.C.A. No. 186 (Q.L.).

334 *R. v. Casey* (1987), 80 N.S.R. (2d) 247 (N.S. C.A.).

335 *R. v. Casey* (1987), 80 N.S.R. (2d) 247 (N.S. C.A.); *R. v. Viger* (1958), 122 C.C.C. 159 (Ont. C.A.).

336 *R. v. Barrette* (1976), 29 C.C.C. (2d) 189 at 192 (S.C.C.); *R. v. Jensen* (1986), 24 C.C.C. (3d) 193 at 195-96 (Ont. H.C.).

337 *R. v. Rose* (1995), 140 N.S.R. (2d) 151 (N.S. S.C.).

338 But see *R. v. Orji*, [1996] O.J. No. 4315 (Ont. Ct. (Gen. Div.)) [unreported] (Q.L.), an appeal from conviction for causing a disturbance, where the court cited the fact that the matter "was not a serious one" while holding that the trial judge exercised his discretion judicially when he refused the appellant's adjournment request.

witness is able to give material evidence.³³⁹

The second requirement, the applicant has not been guilty of neglect, may be satisfied by proof that the absent witness was served with a subpoena. However, the subpoena should be served well in advance of the trial date. Moreover, the witness should be contacted shortly after he or she was served with the subpoena to confirm that he or she will be attending. Confirming well in advance of the eve of trial that the witness received the subpoena and will be attending should rebut an argument that the witness' absence is attributable to the prosecutor's neglect.³⁴⁰

The failure to have subpoenaed the absent witness is almost certainly fatal to a request for an adjournment.³⁴¹ Where the absent witness has not been served with a subpoena, an adjournment may nevertheless be granted if the significance of or need for the testimony of the absent witness has only become apparent on the eve of trial. For example, a defendant that receives disclosure on the trial date may argue that he or she only became aware of the need for a certain witness after reviewing the disclosure provided. If, however, the defendant ought to have known from the nature of the charge, or from information already known to the defendant, that the absent witness' testimony would likely be required, the witness' absence is attributable to the defendant's neglect and an adjournment will likely be refused.³⁴²

The third requirement, showing that it is reasonable to expect the absent witness will attend on the return date, may be met by evidence that the provincial offences officer or prosecutor has spoken to the absent witness, been informed of the reason for his or her absence, and has been told that the witness will be available for the next date set for trial.

4.10.5 To Permit Attendance of Provincial Offences Officer

Occasionally, police witnesses or provincial offences officers are absent for provincial offence matters. Section 49(3) specifically addresses this situation.

49. (3) Adjournment - Despite subsection (1), if the trial is being held in respect of a proceeding commenced under Part I or II, the court shall not adjourn the trial for the purpose of having the provincial offences officer who completed the certificate

339 Section 39(1).

340 See *R. v. Phylypenko*, [1998] O.J. No. 1944 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.); *R. v. Mihailovic*, [1998] O.J. No. 1801 (Ont. Ct. (Prov. Div.)) [unreported] (Q.L.).

341 *R. v. Rose* (1995), 140 N.S.R. (2d) 151 (N.S. S.C.).

342 *R. v. P (C.S.)* (1995), 98 C.C.C. (3d) 463 at 469 (N.S. C.A.).

attend to give evidence unless the court is satisfied that the interests of justice require it.

It is important to note that the provincial offences officer that issued the certificate of offence and served the defendant with an offence notice does not always have to be present for the prosecution of the defendant. In particular, if all elements of the charge can be proved through the testimony of witnesses who are present on the trial date, the prosecutor need not move for an adjournment to permit the attendance of the provincial offences officer. Moreover, it is improper for a trial justice to dismiss the charge against a defendant on the ground that the charging officer is absent, even where the defendant has indicated on the offence notice, pursuant to section 5.2(1), that he or she intends to challenge the evidence of the provincial offences officer.³⁴³ First, the *POA* does not mandate the attendance of provincial offences officer during the trial of a defendant. Second, the prosecutor has complete discretion with respect to which witnesses will be called as part of the prosecution case.³⁴⁴

If, however, the testimony of the provincial offences officer is necessary to prove the charge against the defendant, the prosecutor will need to seek an adjournment. Pursuant to s. 49(3) *POA*, an adjournment to permit the charging officer to attend and give evidence will not be granted unless "the interests of justice require it." Generally, the interests of justice may necessitate an adjournment where it is established the officer is absent due to illness or an emergency, but not where the officer had to fulfill other duties.

The trial justice hearing the motion for an adjournment may rely upon evidence that he or she considers credible and trustworthy. Accordingly, the prosecutor seeking an adjournment may tell the court what he or she has been told by other officers regarding the reasons for the officer's absence.

4.10.6 To Permit Attendance of the Prosecutor

53. (1) Failure of prosecutor to appear – Where the defendant appears for a hearing and the prosecutor, having had due notice, does not appear, the court may dismiss the charge or may adjourn the hearing to another time upon such terms as it considers proper.

³⁴³ *R. v. Panchal*, [1995] O.J. No. 3149 (Ont. Ct. (Prov. Div.)) (Q.L.).

³⁴⁴ *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.).

(2) Idem – Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned hearing under subsection (1), the court may dismiss the charge.

(3) Costs – Where a hearing is adjourned under subsection (1) or a charge is dismissed under subsection (2), the court may make an order under section 60 for the payment of costs.

(4) Written order of dismissal – Where a charge is dismissed under subsection (1) or (2), the court may, if requested by the defendant, draw up an order of dismissal stating the grounds therefore and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceeding against the defendant in respect of the same cause.

Section 53 is intended to prevent defendants from harassment by private prosecutors.³⁴⁵

The application of s. 53 to Part I proceedings is limited, given that Part I proceedings may only be commenced by a provincial offences officer, and not by private complaint.³⁴⁶

Pursuant to s. 53(1), the court may dismiss the charge or adjourn the matter if the prosecutor is absent on the trial date. If the court adjourns the matter, and the prosecutor fails to attend on the return date, pursuant to s. 53(2) the court will dismiss the charge. If the charge is dismissed, s. 53(3) permits the court to make an order for costs under s. 60 against the provincial offences officer who issued the certificate of offence. An order for costs can not be made against the prosecutor.³⁴⁷

4.10.7 To Permit Arrival of Ministry Documents

The discretion to grant an adjournment to permit the arrival of Ministry documents was considered in *R. v. Williamson*. Donnelly J. reviewed a number of factors to be considered by the court in deciding whether to grant an adjournment.³⁴⁸

In the circumstances of a request without advance notice for an adjournment when a case is called for trial, if the court is informed of the following:

- the date of such request or requests for the necessary documentary evidence;

³⁴⁵ Drinkwater W.D. and Ewart J.D., *Ontario Provincial Offences Procedure* (Toronto: Carswell 1980) at 205.

³⁴⁶ Section 3(2) POA.

³⁴⁷ Section 60(2)(b) POA.

³⁴⁸ *R. v. Williamson*, [1987] O.J. No. 365 (H.C.).

- whether the request was written or oral;
- if it was written, whether it was in compliance with the Ministry's usual procedural form;
- whether there has been any particular response to the request; and
- the substance or purport of the request.

Now the court is in a position to have a discernable basis for determining whether it is a case of:

- reasonable diligence;
- simple oversight;
- carelessness or indifference; or
- a callous disregard for the accuser's rights.

4.10.8 Practice Following Adjournment

All adjournments are noted, or endorsed, on the back of the certificate of offence by the clerk of the court. Endorsements on the certificate of offence are the mechanism of the court to keep a record of proceedings.

Similarly, where the court grants an adjournment, the prosecutor should note the following on the notice of trial or prosecution brief:

- the date the adjournment was granted;
- the date to which the matter is adjourned (the return date);
- the party who requested the adjournment;
- brief reason why the adjournment was granted;
- whether the defendant has waived his or her s.11(b) *Charter* rights in relation to the period of delay occasioned by the adjournment; and
- whether the matter has been marked peremptory on any of the parties.

4.11 Evidence

4.11.1 Admissibility – Relevance and Materiality

a. Generally

Before an item of evidence can be considered by the trier of fact, it must be admissible. Admissibility was discussed by LaForest J. in *R. v. Corbett*:

All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy. Questions of relevancy and exclusion are, of course, matters for the trial judge, but over the years many specific exclusionary rules have been developed for the guidance of the trial judge, so much so that the law of evidence may superficially appear to consist simply of a series of exceptions to the rules of admissibility, with exceptions to the exceptions, and their subexceptions.³⁴⁹

As alluded to in the preceding passage, to be admissible, evidence must be relevant to a material issue in the case.³⁵⁰ However, a finding of relevance is not determinative of admissibility. Relevant evidence may be excluded where:³⁵¹

- reception of the evidence would violate an exclusionary rule of evidence; or
- the probative value of the evidence is outweighed by its prejudicial effect.

With respect to evidence tendered by the defendant, the prejudicial effect of the evidence must substantially outweigh its probative value before it may be excluded by the trial justice.³⁵²

In general, the admissibility of evidence should be determined prior to it being received by the court. However, where the relevance of an item of evidence may only become apparent in the context of other evidence in the case, it may be appropriate to delay the determination of admissibility.³⁵³

349 *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at 416-417 (S.C.C.).

350 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 16.

351 *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at 416-417 (S.C.C.); *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 327 (Ont. C.A.).

352 *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 391 (S.C.C.).

353 See *R. v. Hams* (1997), 118 C.C.C. (3d) 498 at 509-510 (Ont. C.A.).

b. Relevance

Generally speaking, relevance is not a legal concept.³⁵⁴ Relevance is a matter of common sense and logic. "[A]ny matter that has a tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, " subject to the trial justice's exclusionary discretion.³⁵⁵ Relevance was discussed by Doherty J.A., speaking for the court, in *R. v. Watson*:

Relevance ... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.³⁵⁶

The focus of the relevance inquiry is upon the relationship between the tendered evidence and the fact that a party seeks to prove.³⁵⁷ This inquiry necessarily entails an assessment of the tendered evidence "in the context of the entire case and the respective positions taken by the Crown and the defence."³⁵⁸ Evidence is relevant simply if it tends to prove the fact or proposition in issue. Accordingly, the weight of the tendered evidence is not considered in determining its relevance.³⁵⁹

c. Materiality

To be admissible, evidence must be relevant to a material issue. Materiality is a legal concept. Evidence is material if it is tendered in support of a fact or matter in issue in the case. Whether a fact is in issue is determined by the substantive law related to the offence charged, and rules of procedure.³⁶⁰

354 See *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.) at 411, for a discussion of "legal relevance". The legal relevance of evidence should be considered following a determination that an item of evidence is logically relevant. Legal relevance refers to the circumstances in which the trial justice may exercise his or her exclusionary discretion.

355 *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at 417-418 (S.C.C.).

356 *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323-324 (Ont. C.A.).

357 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 19.

358 *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323 (Ont. C.A.).

359 *R. v. Morris* (1983), 7 C.C.C. (3d) 97 at 100 *per* McIntyre J., and 103-106 *per* Lamer J. (as he then was); (S.C.C.); *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at 417-418 (S.C.C.).

360 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 28; D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 17.

In a prosecution for a provincial regulatory offence, the prosecutor must prove, beyond a reasonable doubt:

- the *actus reus*, or the prohibited act as defined by the charging legislation;
- identity of the defendant; and
- the *mens rea*, or the prohibited mental element as defined by the charging legislation.

Additionally, the prosecutor must negate any defences that arise in the circumstances of the case beyond a reasonable doubt. Evidence will be material if it is relevant to any of these issues.

4.11.2 Burden of Proof, Standard of Proof and Presumptions

a. Burden of Proof

(i) Generally - Legal Burden and Evidential Burden

The term "burden of proof" is used generally to denote the obligation or duty upon a party to satisfy the trial justice on a fact or matter in issue.

The burden of proof may be subdivided into two separate burdens: the legal burden of proof and the evidential burden of proof. The legal burden of proof refers to the obligation of a party to prove or disprove a fact or matter in issue.³⁶¹ The standard of proof necessary to discharge the legal burden varies according to the fact or issue to be determined.

The evidential burden of proof refers to the obligation of a party to ensure that there is evidence on an issue before the court that is sufficient to warrant consideration of the issue by the trial justice.³⁶² Note that the evidential burden of proof does not require a party to prove anything, nor does it cast a positive obligation upon a party to adduce evidence. The evidential burden may be satisfied by evidence introduced by the party upon whom the evidential burden is cast, by evidence adduced by the opposite party, or through cross-examination of witnesses called by the opposite party.

361 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 119; J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 57 and 58.

362 J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 55.

(ii) Allocation of the Burden of Proof in Criminal and Quasi-Criminal Cases**(1) The Prosecutor**

In criminal and quasi-criminal proceedings, the prosecutor has the legal burden of proving the offence charged against the defendant beyond a reasonable doubt. This onus is "inextricably linked to the presumption of innocence" and right to a fair trial.³⁶³

Establishing the guilt of the defendant requires that each element of the offence be proved beyond a reasonable doubt.³⁶⁴ In criminal and quasi-criminal proceedings, the prosecutor must prove, beyond a reasonable doubt:

- identity;
- the *actus reus*, or prohibited act as defined by the charging statute; and
- the *mens rea*, or requisite mental state as defined by the charging statute.³⁶⁵

Additionally, the prosecutor must also negate any defences that arise in the circumstances of the case beyond a reasonable doubt.

Before the trier of fact may consider whether the prosecutor has satisfied the legal burden, the prosecutor has the evidential burden of adducing evidence on each of the essential elements or issues to be determined in the case.³⁶⁶ The evidential burden cast upon the prosecutor may also be referred to as the requirement to establish a *prima facie* case: ensuring that there is evidence on each essential element which would justify a finding of guilt.³⁶⁷ Once a *prima facie* case has been established, the failure of the defendant to adduce evidence to meet the *prima facie* case leaves the defendant susceptible to being found guilty. Depending upon the cogency of the evidence against the defendant, the defendant may have a "tactical burden" of adducing evidence to contradict the case against him or her.

Note that for strict liability offences, the prosecutor need only prove commission of the prohibited act, and that the defendant committed the act, both beyond a reasonable doubt. Upon satisfying this burden, the fault element is presumed; the defendant is deemed to have been negligent. The onus then shifts to the defendant to prove, on a balance of

³⁶³ *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 6 (S.C.C.).

³⁶⁴ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at 210-211 (S.C.C.); *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 at 190 (Ont. C.A.).

³⁶⁵ *Woolmington v. D.P.P.*, [1935] A.C. 463 at 481-482 (H.L.).

³⁶⁶ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 122.

³⁶⁷ J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 71-73.

probabilities, that he exercised due diligence in the circumstances.³⁶⁸

(2) The Defendant

In full *mens rea* offences, the defendant has the evidential burden of adducing evidence with respect to any defence available in the circumstances of the case. Once the defendant discharges this evidential burden, the prosecutor has the legal burden of negating the defence beyond a reasonable doubt.

(3) Evidence and Burdens of Proof

Ordinarily, a party in a proceeding can ask the trier of fact to make a finding simply by pointing at some evidence in the case that supports that finding of fact. Sometimes, however, a finding of fact can not be made unless certain preliminary facts are proved. For example, before a spontaneous utterance will be admitted as an exception to the hearsay rule, it must first be proved that the declarant made the statement while the event occurred or shortly afterwards, in such circumstances of spontaneity that it can be said the declarant was under the stress of the event, and the possibility of concoction can be discounted.³⁶⁹ In general, preconditions for the admissibility of evidence must be established on a balance of probabilities.³⁷⁰

However, the burden of proof beyond a reasonable doubt applies to preliminary questions of fact regarding the admissibility of evidence where admission of the evidence may itself have a conclusive effect with respect to the defendant's guilt.³⁷¹ A notable example is determination of the voluntariness of a statement given to a person in authority by the defendant. Given the often conclusive nature of a confession, proof of voluntariness beyond a reasonable doubt is a precondition to admissibility of the confession.³⁷² Similarly, basic facts which trigger a presumption concerning a vital issue of guilt or innocence must be proven beyond a reasonable doubt.³⁷³

³⁶⁸ Strict and absolute liability offences are discussed in Section 4.3.3, "Fault".

³⁶⁹ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 271.

³⁷⁰ *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 at 297 (S.C.C.).

³⁷¹ *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 209-210 (S.C.C.).

³⁷² *R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.); *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 209-210 (S.C.C.).

³⁷³ *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 209-210 (S.C.C.).

b. Standard of Proof

(i) Introduction

The term "standard of proof" refers to the degree of proof necessary to satisfy the legal or evidential burden imposed on a party. In criminal and quasi-criminal prosecutions, there are two standards of proof: (1) proof beyond a reasonable doubt; and (2) proof on a balance of probabilities.

(ii) Proof Beyond a Reasonable Doubt

(1) Generally

The prosecutor has the onus of proving the guilt of the defendant beyond a reasonable doubt. "Reasonable doubt" is a legal term, and signifies "a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence."³⁷⁴ Reasonable doubt was comprehensively defined by Cory J., writing for the court, in *R. v. Lifchus*.³⁷⁵

(i) Summary

Perhaps a brief summary of what the definition [of reasonable doubt] should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice, rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty - a jury which concludes only that the accused is probably guilty must acquit.

³⁷⁴ *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 11-12 (S.C.C.).

³⁷⁵ *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 13-14 (S.C.C.).

On the other hand, certain references to the required standard of proof should be avoided. For example:

- describing the term "reasonable doubt" as an ordinary expression which has no special meaning in the criminal law context;
- inviting jurors to apply to the task before them the same standard of proof that they apply to important, or even the most important, decisions in their own lives;
- equating proof "beyond a reasonable doubt" to proof "to a moral certainty";
- qualifying the word "doubt" with adjectives other than "reasonable", such as "serious," "substantial" or "haunting," which may mislead the jury; and
- instructing jurors that they may convict if they are "sure" that the accused is guilty, before providing them with a proper definition as to the meaning of the words "beyond a reasonable doubt."

(ii) Suggested Charge

Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression "beyond a reasonable doubt" mean?

The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove

anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

The standard of proof beyond a reasonable doubt does not apply to individual items of evidence.³⁷⁶ Rather, the prosecutor need only prove each essential element of the offence charged beyond a reasonable doubt.³⁷⁷ In determining whether the prosecutor has discharged his or her onus, the trier of fact must consider the evidence as a whole to determine whether the guilt of the defendant has been established.³⁷⁸

(iii) Credibility and Reasonable Doubt

The concept of reasonable doubt applies to the assessment of credibility by the trier of fact.³⁷⁹ The determination of the defendant's guilt is not a "simple credibility contest" between the prosecution and defence witnesses.³⁸⁰

It is an error of law for a trial justice to direct him or herself that, in order to render a verdict, he or she must believe either the prosecution evidence or the defence evidence.³⁸¹ Defining the credibility assessment as an either/or proposition excludes the third alternative; namely, that the trier of fact, without believing the defendant, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to the defendant's guilt.³⁸² The effect of such an approach is "to shift a burden to the [defendant] of demonstrating his or her innocence," since the trier of fact would erroneously believe that the defendant could not be acquitted unless the defence evidence was believed.³⁸³

In cases where the assessment of credibility is important or determinative,³⁸⁴ the trial justice ought to apply the following principles to the assessment of credibility:

- First, if you believe the evidence of the accused, obviously you must acquit.

³⁷⁶ *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 at 190 (Ont. C.A.).

³⁷⁷ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at 210-211 (S.C.C.); *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 at 190 (Ont. C.A.).

³⁷⁸ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at 210-211 (S.C.C.).

³⁷⁹ *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 at 409 (S.C.C.).

³⁸⁰ See *R. v. Tahirkheli* (1998), 130 C.C.C. (3d) 19 at 23 (Ont. C.A.).

³⁸¹ *R. v. S.(W.D.)* (1994), 93 C.C.C. (3d) 1 at 10 (S.C.C.).

³⁸² *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 at 409 (S.C.C.).

³⁸³ *R. v. S.(W.D.)* (1994), 93 C.C.C. (3d) 1 at 10 (S.C.C.).

³⁸⁴ *R. v. Town* (1998), 125 C.C.C. (3d) 177 at 182 (Ont. C.A.); *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 at 409 (S.C.C.).

- Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.³⁸⁵

(iv) Proof on a Balance of Probabilities

Proof on a balance of probabilities requires proof that it is more probable than not that the event in issue occurred. A useful way of conceptualizing proof on a balance of probabilities is to use a mathematical formula: the burden is discharged where the trier of fact is 51% sure that the event happened.

c. Presumptions

(i) Generally

Presumptions are evidential shortcuts which assist the prosecutor in discharging the legal burden of proof, by making the proof of material facts easier. Presumptions permit the prosecutor to establish the more readily proved basic fact, and then shift the burden upon the defendant to rebut the presumed fact.³⁸⁶

In *R. v. Oakes*, Dickson C.J.C., speaking for the majority, discussed the nature of presumptions;

Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross On Evidence*, 5th ed. (1979), pp. 122-3).

Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

³⁸⁵ *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 at 409-410 per Cory J (S.C.C.).

³⁸⁶ D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 285.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the nonexistence of the presumed fact.

Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (*Cross on Evidence*, at p. 124) while the former involve actual legal rules.³⁸⁷

For the purposes of the discussion that follows, a "true presumption" is defined as a presumption with a basic fact that is mandatory but rebuttable.

(ii) False Presumptions

(1) Presumption Without a Basic Fact

A presumption without a basic fact is a conclusion that must be drawn until the contrary is proved through the discharge of either a legal or evidential burden.³⁸⁸ A presumption without a basic fact is better understood as being a rule of substantive law rather than a presumption,³⁸⁹ because it does not require proof of a basic fact before the "presumption" is made.³⁹⁰

The presumption of innocence is the best example of a presumption without a basic fact. The defendant does not have to prove anything before he or she is protected by the presumption of innocence. The prosecution can rebut the presumption of innocence by discharging its legal burden, proving the defendant's guilt beyond a reasonable doubt.

(2) Permissive Presumptions

A permissive presumption, a sub-category of presumptions with a basic fact, is a "presumption" that may be drawn upon proof of a basic fact.³⁹¹ They are optional: the trier of fact may, but not must, infer the presumed fact upon proof of the basic or substituted

387 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 330-331 (S.C.C.).

388 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 330 (S.C.C.);

389 See J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 95.

390 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 287.

391 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 330 (S.C.C.).

fact. Permissive presumptions result in a tactical burden being placed upon the defendant. Upon proof of the basic fact, the defendant may choose to call evidence in rebuttal, but is not required to do so.³⁹²

It is analytically clearer to define permissive presumptions as being permissive inferences. An inference is a deduction of fact which may logically and reasonably be drawn from other facts that have been established in a proceeding.³⁹³ It is apparent that inferences and permissive presumptions are analogous concepts. An inference, like a permissive presumption, is a conclusion that may, but not must, be drawn.³⁹⁴

Permissive presumptions have attained the status of "presumptions" because of the frequency of their use.³⁹⁵ A good example of a permissive presumption is the doctrine of recent possession.³⁹⁶ Upon proof that the defendant was in possession of recently stolen property, the trier of fact may, but not must draw the inference that the defendant knew that the goods were stolen.

(3) Irrebuttable Presumptions

Irrebuttable presumptions are just that: once the "presumption" is drawn from the basic fact, it can't be rebutted. It should be apparent that an irrebuttable presumption is better understood as being a legal definition.

(iii) True Presumptions

A true presumption is a presumption with a basic fact that is mandatory but rebuttable. Upon proof of the basic fact and an absence of rebutting evidence, a mandatory but rebuttable presumption prescribes that a certain legal consequence will follow.³⁹⁷ In general, true presumptions have developed because, as a matter of human experience, where the basic fact exists, the presumed fact tends to exist.³⁹⁸

392 *R. v. Downey* (1992), 72 C.C.C. (3d) 1 at 8 (S.C.C.).

393 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 79.

394 J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 97.

395 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 85; J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 98.

396 See *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1 (S.C.C.).

397 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 85.

398 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 286.

As noted in *Oakes*, there are three standards of proof which may be required to rebut a presumption. The defendant may be required to adduce evidence that:

- raises a reasonable doubt;
- satisfies an evidential burden, in order to bring into question the truth of the presumed fact; or
- satisfies a legal or persuasive burden, sufficient to disprove the presumed fact on a balance of probabilities.³⁹⁹

The substantive law defining the offence charged governs the standard of proof to be met in order to rebut a presumption.

(iv) Presumptions and the Canadian Charter of Rights and Freedoms

(1) Section 11(d) - The Presumption of Innocence

Section 11(d) of the *Charter* guarantees the right to be presumed innocent. A presumption violates section 11(d) *Charter* where, as a result of the operation of the presumption, a defendant can be found guilty despite the existence of a reasonable doubt.

⁴⁰⁰ In other words, only where proof of the basic fact leads inexorably to proof of the presumed fact, will a presumption not offend section 11(d) *Charter*.⁴⁰¹

Section 11(d) of the *Charter* provides:

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The principles governing the constitutionality of presumptions derived from the Supreme Court of Canada jurisprudence were summarized by Cory J., writing for the majority, in *R. v. Downey*:⁴⁰²

The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

If by the provisions of a statutory presumption, an accused is required to establish,

³⁹⁹ *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 330-331 (S.C.C.).

⁴⁰⁰ *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 343 (S.C.C.); *R. v. Downey* (1992), 72 C.C.C. (3d) 1 at 8-9 (S.C.C.).

⁴⁰¹ *R. v. Whyte* (1988), 42 C.C.C. (3d) 97 at 109-110 (S.C.C.); *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 at 135 (S.C.C.); *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (S.C.C.).

⁴⁰² *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (S.C.C.).

that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.

A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(d).

A provision that might have been intended to play a minor role in providing relief from conviction will none the less contravene the Charter if the provision (such as the truth of a statement) must be established by the accused.

It must of course be remembered that statutory presumptions which infringe s. 11(d) may still be justified pursuant to s. 1 of the Charter.

(2) Section 1 - Reasonable Limit

Pursuant to section 1 of the *Charter*, limitations of rights guaranteed under the *Charter* may be upheld if such limits are "reasonable limits prescribed by law as can be justified in a free and democratic society."

The framework for a section 1 analysis was established in *R. v. Oakes*. In *Oakes*, the Supreme Court of Canada considered the constitutionality of former section 8 of the *Narcotic Control Act*, which provided that where an accused is found in possession of a narcotic, he must establish that he did not have possession for the purpose of trafficking. The provision in effect cast a legal burden upon an accused to disprove, on a balance of probabilities, the presumed fact of possession for the purpose of trafficking. The provision was held to be a violation of section 11(d) *Charter*, and was not saved by section 1.

Dickson C.J.C. held that, once the party alleging a limit of a *Charter* right has established the limit on a balance of probabilities, the onus shifts to the opposite party to uphold the

limit as a reasonable one. In order to establish that a limit is justified under section 1, the following test must be met:

- the objective of the provision responsible for a limit on a *Charter* right or freedom must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”;
- there must be proportionality between the means chosen to limit the *Charter* right and the limitation of the *Charter* right. This entails a three step analysis. The means chosen must:
 1. be rationally connected to the objective, and not arbitrary, unfair or based on irrational considerations;
 2. impair as little as possible the *Charter* right in question; and
 3. be such that their effects on the limitation of rights and freedoms are proportional to the objective.⁴⁰³

It was held that section 8 of the *Narcotic Control Act* failed the first aspect of the proportionality test. Given that the provision would catch an accused who was in possession of a very small quantity of drugs, there was no rational connection between the basic fact of possession and the presumed fact of intent to traffic.⁴⁰⁴

4.11.3 The *Voir Dire*

A *voir dire* is a “trial within a trial.” The sole purpose of a *voir dire* is to determine factual and legal issues related to the admissibility of evidence.

Whether or not a *voir dire* will be conducted is a matter of discretion for the trial justice. In order to persuade the trial justice to conduct the *voir dire*, the applicant must establish a sufficient foundation for the admission of the contested evidence.⁴⁰⁵ To do so, the applicant must state with “reasonable particularity” the grounds for the *voir dire*, and provide the court with an outline of the evidence to be called. A *voir dire* will not be held where the contested evidence is not relevant to any of the issues to be determined in the

403 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 348 (S.C.C.); *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 216 (S.C.C.).

404 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 at 350 (S.C.C.).

405 *R. v. Durette* (1992), 72 C.C.C. (3d) 421 (Ont. C.A.), revd 88 C.C.C. (3d) 1 (S.C.C.); *R. v. Feldman* (1994), 91 C.C.C. (3d) 256 (B.C. C.A.).

trial.⁴⁰⁶

Generally, a *voir dire* will be held where the defendant objects to the admissibility of evidence.⁴⁰⁷ Accordingly, a *voir dire* is unnecessary where the defendant waives the requirement of a *voir dire*.⁴⁰⁸ Nor is a *voir dire* necessary where the contested evidence is admissible by statute.

On the *voir dire*, the trial justice is restricted to considering questions regarding the admissibility of the evidence. Admissibility of evidence is a question of law. The trial justice is not to consider the weight or sufficiency of evidence.⁴⁰⁹ This dichotomy is related to the trial justice's dual role as both trier of law and trier of fact. Once evidence has been ruled admissible, the trial justice, in his or her role as trier of fact, may consider the weight, sufficiency, credibility and reliability of the evidence in determining whether the defendant is guilty of the offence charged.

The party seeking to admit contested evidence has the onus of establishing admissibility. This requires the applicant to satisfy any tests which are a precondition to the admissibility of the evidence. If the test involves the resolution of a factual issue, in general, the applicable standard of proof is on a balance of probabilities.⁴¹⁰

Where, however, the evidence sought to be admitted has the potential to be determinative of all issues in the case, such as the confession of the defendant, any preliminary facts regarding the admissibility of the evidence must be proved beyond a reasonable doubt.⁴¹¹

The procedure on a *voir dire* is the same as the trial proper. The party that wishes evidence to be determined admissible tenders evidence in support of its position. The opposite party may cross-examine any witnesses called, and may call witnesses of its own, who in turn may be cross-examined. After all of the evidence, both parties have the opportunity to make submissions, following which the trial justice will rule on the admissibility of the contested evidence.

406 *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C. C.A.).

407 *R. v. D.(G.N.)* (1993), 81 C.C.C. (3d) 65 (Ont. C.A.).

408 *R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.).

409 *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.).

410 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.); *R. v. Evans* (1993), 85 C.C.C. (3d) 97 at 104-105 (S.C.C.).

411 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

4.11.4 Direct Evidence and Circumstantial Evidence

a. Direct Evidence

Direct evidence is evidence which, if believed, establishes a material fact without the need for additional inferences to be drawn.⁴¹² It is evidence from an eyewitness that observed or perceived the fact or matter in issue. It is implicit in this definition that the only inference that needs to be drawn by a trier of fact considering direct evidence is that the eyewitness testimony is true.⁴¹³

b. Circumstantial Evidence

(i) Generally

Circumstantial evidence is any evidence other than the testimony of an eyewitness to a material fact. Circumstantial evidence requires the trier of fact to draw an inference about a material fact from a proven fact.⁴¹⁴ An inference is a deduction of fact which must be drawn from the proven fact. It is a conclusion that may logically and reasonably be drawn from a proven fact.⁴¹⁵

Before the trier of fact may consider circumstantial evidence, there must be a finding that it is relevant to a material issue or fact.

The distinction between direct and circumstantial evidence may be illustrated by the following example. Evidence from witness A that she saw C's motor vehicle collide with the back of D's motor vehicle is direct evidence that C's motor vehicle rear-ended D's motor vehicle. Evidence from witness B that she heard a loud crash, ran outside and saw C's motor vehicle, which had a dented grille, parked behind D's motor vehicle, which had a dented rear bumper, is circumstantial evidence that C's motor vehicle rear-ended D's motor vehicle. The trier of fact may infer from the evidence of witness B regarding the condition and position of the two motor vehicles that C's motor vehicle collided with the back end of D's motor vehicle.

An item of circumstantial evidence may be subject to competing inferences and interpretations. The relevance and weight of circumstantial evidence must be assessed in

412 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 20.

413 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 38.

414 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 20.

415 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 79.

light of all of the evidence in the case,⁴¹⁶ "to determine whether it is consistent with guilt and inconsistent with any other rational conclusion."⁴¹⁷

Prior to the Supreme Court of Canada's decision in *R. v. Cooper*,⁴¹⁸ before a verdict of guilty could be returned in cases where the evidence against the defendant is mostly or entirely circumstantial, the trier of fact had to be satisfied that the proven facts: (a) were consistent with defendant's guilt; and (b) excluded every possible explanation other than the defendant's guilt.⁴¹⁹ This was known as the "Rule in *Hodge's Case*". It is apparent that the "Rule in *Hodge's Case*" placed a heavier onus than that usually imposed upon the prosecution in a criminal case, that being proof of the defendant's guilt beyond a reasonable doubt. The "rule" developed because of judicial circumspection regarding the probative value of circumstantial evidence relative to direct evidence.

In *Cooper*, the distinction in the burden of proof drawn between direct and circumstantial evidence was rejected. It is now clear that in all cases, whether the evidence is direct or circumstantial, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the defendant is the only reasonable inference to be drawn from the proven facts⁴²⁰ before a verdict of guilty may be returned.

(ii) *Post-Offence Conduct*⁴²¹

The post-offence words and conduct of the defendant may, in certain circumstances, provide circumstantial evidence of the defendant's culpability for the offence charged. Where post-offence conduct is introduced, the trier of fact is asked to infer from the conduct that the defendant knew that he or she committed the offence charged, and acted to evade detection and prosecution.⁴²² Evidence typically tendered as "post-offence conduct" in support of the defendant's guilt includes evidence of flight from the scene of the alleged offence, and lies or a false alibi related to the offence charged.⁴²³

Like all circumstantial evidence, evidence of post-offence conduct must be considered in

416 D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 21-22.

417 *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 (S.C.C.).

418 *R. v. Cooper* (1977), 34 C.C.C. (2d) 18 (S.C.C.).

419 *Hodge's Case*, [1838] 2 Lewin C.C. 227, 168 E.R. 1136 (Q.B.).

420 *R. v. Cooper* (1977), 34 C.C.C. (2d) 18 (S.C.C.) at 33; *R. v. Elmosri* (1985), 23 C.C.C. (3d) 503 at 506 (Ont. C.A.).

421 Formerly referred to as evidence of "consciousness of guilt". In *R. v. White* (1998), 125 C.C.C. (3d) 385 at 397-398, (S.C.C.) Major J., writing for the court indicated that the term "consciousness of guilt" is misleading and should be discouraged. An inference of "consciousness of guilt" is only one inference that may be drawn from post-offence conduct, and the term itself suggests a conclusion about the conduct, which has a tendency to undermine the presumption of innocence. The use of more neutral language is preferred.

422 *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 (S.C.C.).

423 *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at 299 (S.C.C.).

light of all of the evidence in the case.⁴²⁴ Before evidence of post-offence conduct can be considered, the trier of fact does not have to be satisfied beyond a reasonable doubt that the words or conduct of the defendant were caused by the defendant's consciousness of guilt for the offence charged.⁴²⁵

Post-offence conduct is highly ambiguous.⁴²⁶ There is a danger that the trier of fact may fail to consider alternative explanations for the defendant's behaviour and place undue emphasis upon the evidence in concluding that the defendant is guilty of the offence charged.⁴²⁷ Accordingly, the trier of fact should not consider evidence of post-offence conduct where the defendant has admitted culpability for another offence and the evidence of post-offence conduct "cannot logically support an inference of guilt with respect to one [offence] rather than the other."⁴²⁸

(1) Flight

Flight may be circumstantial evidence of the defendant's guilt for the offence charged. Where evidence of flight is introduced, the trier of fact is asked to undertake the following chain of reasoning:

- from the defendant's behaviour to flight;
- from flight to consciousness of guilt;
- from consciousness of guilt to consciousness of guilt concerning the offence in question; and
- from consciousness of guilt of the offence in question to actual guilt of the offence in question.⁴²⁹

⁴²⁴ *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 (S.C.C.).

⁴²⁵ *R. v. White* (1996), 108 C.C.C. (3d) 1 (Ont. C.A.), aff'd 125 C.C.C. (3d) 385 (S.C.C.).

⁴²⁶ *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 (S.C.C.).

⁴²⁷ *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at 299 (S.C.C.); *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 (S.C.C.).

⁴²⁸ *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at 301-300 (S.C.C.); *R. v. White* (1998), 125 C.C.C. (3d) 385 at 399 (S.C.C.).

⁴²⁹ *United States v. Myers*, 550 F.2d 1036 at 1049 (5th Cir., 1977); *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at 300 (S.C.C.).

(2) *Lies or False Alibi*

Where a statement proven to be false is introduced into evidence, the trier of fact is asked to infer that:

- the defendant lied because he or she had a guilty conscience; and
- the defendant had a guilty conscience because the defendant committed the offence charged.⁴³⁰

Before a statement or alibi can be used as evidence of consciousness of guilt, it must be proven false.⁴³¹ Mere disbelief or rejection of the defendant's evidence does not constitute positive evidence of the defendant's guilt.⁴³² With respect to an alleged false alibi, there must be evidence from which it would be reasonable to infer that the alibi was deliberately fabricated and that the defendant was a party to the fabrication before it may be used as evidence of consciousness of guilt.⁴³³

4.11.5 Formal Admissions

a. Generally

A formal admission is a concession or voluntary acknowledgment made by a party that a certain fact or issue is not in dispute. Formal admissions dispense with the need for proof at trial of the subject matter of the admission. A formal admission should be distinguished from an informal admission, the latter being an exception to the hearsay rule.

In proceedings under the *POA*, there are two types of formal admissions: a guilty plea under s. 45(2) *POA*,⁴³⁴ or an admission of fact under s. 46(4) *POA*.

b. Admission of Fact

Section 46(4) *POA* provides:

Agreed facts – The court may receive and act upon any facts agreed upon by the defendant and the prosecutor without proof of evidence.

430 *R. v. Levy* (1991), 62 C.C.C. (3d) 97 at 101 (Ont. C.A.).

431 *R. v. Levy* (1991), 62 C.C.C. (3d) 97 (Ont. C.A.) regarding lies; *R. v. Michaud* (1995), 98 C.C.C. (3d) 121 at 128-129 (N.B. C.A.), aff'd (1996), 107 C.C.C. (3d) 193 at 194 (S.C.C.).

432 *R. v. Witter* (1996), 105 C.C.C. (3d) 44 at 53 (Ont. C.A.); *R. v. Levy* (1991), 62 C.C.C. (3d) 97 at 101 (Ont. C.A.).

433 *R. v. Witter* (1996), 105 C.C.C. (3d) 44 at 52-53 (Ont. C.A.).

434 Guilty pleas are discussed in Section 4.9, "Arraignment and Plea".

Pursuant to s. 46(4), a defendant may admit any fact alleged against him or her. It is important to note that the ultimate decision regarding the subject matter of an admission lies with the prosecutor. Any admission must first be accepted by the prosecutor.⁴³⁵ Acceptance by the prosecutor of an admission by the defendant constitutes conclusive proof of the fact(s) underlying the admission.

Admissions usually take the form of an agreed statement of facts. The prosecutor and defendant will meet sometime prior to the hearing to agree upon the facts, if any, that will be read onto the record for consideration by the trial justice, either at trial or on sentence. An agreed statement of facts may be admitted where the facts are clearly agreed upon by the parties.⁴³⁶ Where there is a dispute regarding an agreed fact, the trial justice should require evidence to be called.

4.11.6 Real Evidence

a. Generally

Real evidence is any evidence, which is tendered before the court that requires the trier of fact to rely upon its own senses to make observations and draw conclusions rather than relying upon the testimony of a witness.⁴³⁷ Real evidence conveys a “relevant first-hand sense impression” to the trier of fact without the need for an intermediary to describe or explain what transpired.⁴³⁸ Real evidence includes photographs, videotapes, and even the appearance or demeanour of a witness.⁴³⁹

Before real evidence will be admitted as an exhibit by the court, the party tendering it must authenticate or identify it through testimonial evidence, or alternatively by admission of the opposite party.

The weight to be assigned real evidence is a matter for the trier of fact once it has been admitted.

435 *R. v. Castellani*, [1970] 4 C.C.C. 287 (S.C.C.).

436 *R. v. Corburn* (1982), 66 C.C.C. (2d) 463 (Ont. C.A.).

437 J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 17.

438 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 57.

439 Appearance and demeanour of a witness is discussed in Section 4.12, Examination of Witnesses.

b. Photographs

Photographs are a valuable form of evidence which have the potential to be more useful to the trier of fact than oral testimony. It is self-apparent that a good quality photograph may more clearly and accurately portray or describe a person, place or event than the oral testimony of a witness who may or may not be subject to the frailties of eyewitness testimony.

A photograph will be admissible in evidence if the following three criteria are met:⁴⁴⁰

- it truly and accurately represents the facts;
- it is fair, in the sense that it is not tendered with the intention to mislead; and
- a person capable of doing so verifies it on oath.

c. Videotapes

The admissibility of videotape evidence is governed by the same criteria as that applicable to photographic evidence.⁴⁴¹ "Once it has been established that a videotape has not been altered or changed, and that it accurately depicts the scene of [an offence], then it becomes admissible and relevant evidence."⁴⁴²

The rationale underlying the use of videotape evidence is also similar to that supporting the use of photographic evidence. Videotape evidence is not subject to the same frailties which may reduce the efficacy of eyewitness testimony. This much is apparent from the following comments of Cory J. in *R. v. Nikolovski*:

The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

Like photographic evidence, videotape evidence must be authenticated by someone who is capable of doing so, whether this is the operator of the video-recorder, or an eyewitness

⁴⁴⁰ *R. v. Creemer*, [1968] 1 C.C.C. 14 at 22 (N.S.C. A.D.); *R. v. Schaffner* (1988), 44 C.C.C. (3d) 507 at 510 (N.S. C.A.).

⁴⁴¹ *R. v. Maloney* (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.); *R. v. Schaffner* (1988), 44 C.C.C. (3d) 507 at 510 (N.S. C.A.); *R. v. Leaney* (1987), 38 C.C.C. (3d) 263 (Alta. C.A.).

⁴⁴² *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 at 416 (S.C.C.).

to the events recorded.⁴⁴³ It is important to note, however, that the videotape itself constitutes real evidence, and may be relied upon by the trier of fact as proof of the matter asserted without the need for corroboration by an eyewitness.⁴⁴⁴

The weight to be accorded videotape evidence is a function of the clarity and quality of the tape.

4.11.7 Documentary Evidence

Documentary evidence has been broadly defined and can include anything, other than testimony, that can be perceived and presented in a courtroom.⁴⁴⁵ When a document is produced at trial, the primary requirement for its admission is that the document be proved. Proof in this context has more than one meaning. Firstly, it must be proven that the document is what it purports to be. In some cases, production of the document or a copy will suffice to prove this element, while in other cases the due execution of the document must also be proved. Secondly, where the document introduced is a copy of the original, it must be proved that it is a correct copy of the original. Finally, proof encompasses the establishment of the truth of the contents of the document.

The requirement that a document be proved is subject to several exceptions and in some circumstances a document will be admissible without proof.

A document which can be categorized as a “public document” is admissible without proof on the basis of its inherent reliability. Similarly judicial records are admissible at common law. It should also be noted that provisions under the *Canada Evidence Act*, the various provincial evidence acts and other provincial statutes allow for the admissibility without proof of documents that would not qualify as public documents at common law.

a. Best Evidence Rule

The best evidence rule was established in *Ford v. Hopkins*⁴⁴⁶ in 1701. The rule provided that the parties should endeavour to put forward the best evidence that the nature of the case will allow.⁴⁴⁷ The intent of the rule was to protect the parties against fraud, perjury or error which would have a negative impact on the proceeding.

⁴⁴³ *R. v. Leaney* (1987), 38 C.C.C. (3d) 263 (Alta. C.A.).

⁴⁴⁴ *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 at 412 (S.C.C.).

⁴⁴⁵ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 1004.

⁴⁴⁶ (1701), 1 Salk. 283, 90 E.R. 964 (KB)

⁴⁴⁷ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 1005.

In 1969, with respect to the best evidence rule, Lord Denning said: ⁴⁴⁸

“The old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in one’s hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays, we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility.”

It is clear from the previous passage that in modern times the best evidence rule will be applied to determine the weight given to evidence rather than to assess its admissibility.

4.11.8 Hearsay

a. Generally

Hearsay is an out-of-court statement or assertion that is introduced to prove the truth of its contents. ⁴⁴⁹ Absent an exception, hearsay is inadmissible.

Out-of-court statements that may offend the rule against hearsay can be oral, or written. They may also be implied statements, revealed through the declarant’s ⁴⁵⁰ conduct or actions, such as nodding of the head.

The rationale for the hearsay rule is based upon our adversarial system of justice, and in particular what are called the “hearsay dangers.” There are four testimonial factors which affect the credibility and reliability of a witness’ testimony: the witness’ opportunity to perceive the event; the witness’ memory; the witness’ ability to communicate what he or she observed; and, the witness’ sincerity. In our system of justice, cross-examination before the trier of fact is the means for exploring potential errors in a witness’ testimony. All of the testimonial factors can be explored. Moreover, the witness is in court testifying under oath, enhancing the trustworthiness of the testimony, and the trier of fact can observe the witness’ demeanour while testifying.

In contrast, where a witness is called simply to relay what he or she has been told, all that can be tested is the accuracy of the witness’ memory and understanding of what was said to him or her.

⁴⁴⁸ *Garton v. Hunter*, [1969] 1 All E.R. 451 at 453 (C.A.).

⁴⁴⁹ *R. v. Evans* (1993), 85 C.C.C. (3d) 97 at 102 (S.C.C.).

⁴⁵⁰ When discussing hearsay problems, the *declarant* is the person who uttered the statement which a party seeks to introduce in evidence. The hearsay problem arises because the declarant is not called as a witness. Rather, the person who heard the declarant utter the statement, the *recipient*, is the person called to give evidence.

b. Purpose for Which Evidence Adduced

The starting point for any hearsay analysis is to determine the purpose for which evidence has been adduced. Not all out-of-court statements are inadmissible. Admissibility depends on whether the statement has been adduced for a hearsay or non-hearsay purpose. The question that must be asked is this: what is the relevance of the statement? Only out-of-court statements offered for the purpose of proving the truth of the statement's contents offend the hearsay rule and are inadmissible. If the statement is relevant to a purpose other than to prove the truth of the statement's contents, *i.e.* to prove the fact that the statement was made, it is non-hearsay and admissible.

A simple example can illustrate the difference between hearsay and non-hearsay uses of the same statement. Suppose A and B, who live at opposite ends of the city, were talking on the phone. A told B that where he is, it is raining. A subsequently dies and is unavailable to testify. The prosecutor wants to adduce, through B, A's statement that it was raining outside. If the purpose of adducing A's statement is to prove that it was in fact raining outside, then the statement is adduced to prove the truth of its contents and offends the hearsay rule. If, however, A's statement is adduced to support B's belief that it was raining outside, then admission of the statement would not offend the hearsay rule. In the latter situation, the statement is relevant to B's state of mind or knowledge. The foundation for B's belief that it was raining outside is what B was told by A. If the issue is B's state of knowledge, what B knew does not depend upon the accuracy or truth of what B was told.

Another example can be found in *R. v. Wildman*.⁴⁵¹ In *Wildman*, the accused was convicted of first-degree murder. The victim was his step-daughter. Her body was not discovered until four days after she was killed. The most incriminating evidence against the accused was a statement he made before the victim's body was found indicating that the victim was killed with a hatchet. Only the killer would have such knowledge. The defence tried, unsuccessfully, to adduce evidence from two witnesses who had received a phone call the day after the murder, in the accused's presence, from someone identifying herself as the accused's estranged wife. This call was made before the accused made his statement regarding how the victim died. The caller accused the two witnesses and the accused of murdering the victim with a hatchet. The defence sought to adduce this evidence to explain the basis for the accused's knowledge. The trial judge excluded the

451 *R. v. Wildman* (1984), 14 C.C.C. (3d) 321 (S.C.C.).

evidence on the basis that it was hearsay, and the accused was convicted. His appeal to the Ontario Court of Appeal was dismissed.

An appeal to the Supreme Court of Canada was allowed. On appeal the court found that the trial judge erred in excluding evidence that was essential to the accused's defence. The evidence of the telephone call was not adduced to prove the truth of the caller's statement. Rather, the evidence was relevant to the accused's state of knowledge; the evidence explained how the accused knew the cause of the victim's death.

Accordingly, the hearsay rule can be restated as follows:⁴⁵²

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

c. Implied Assertions

As noted above, a hearsay statement may be oral, written or implied. An implied assertion is any assertion that is not explicitly made by the declarant, but is revealed through the declarant's conduct or actions.

Again, a simple example can illustrate the meaning of implied assertions. Suppose A observes through his apartment window B walking outside along the sidewalk. B is holding an umbrella above his head. If A is called to testify, evidence that B was carrying an umbrella above his head is, on a strict hearsay analysis, inadmissible to prove that it was in fact raining. In contrast, the same evidence is admissible to prove A's belief that it was raining.

⁴⁵² *Subramanian v. Public Prosecutor*, [1956] 1 W.L.R. 965 at 970 (P.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 at 264 (S.C.C.).

Implied assertions were considered by the House of Lords in *R. v. Kearley*.⁴⁵³ In *Kearley*, evidence that the accused drug dealer received ten phone calls from a number of people requesting drugs was held to be inadmissible hearsay. The relevance of the phone calls was to prove that the accused was a drug dealer, a message that was implicit in the calls.⁴⁵⁴

d. Exceptions

(i) Generally

The hearsay rule is a rule of exclusion. It was traditionally interpreted as an absolute rule, subject to various categories of exceptions. The rule against hearsay could be overcome where the party tendering the evidence established that the tendered evidence fit into a recognized hearsay exception. While the “pigeon-hole” approach to the admission of hearsay, as it is often referred to, resulted in certainty in the law of hearsay, it also proved to be inflexible in dealing with new situations.⁴⁵⁵

(ii) The Principled Approach to the Admission of Hearsay

In *R. v. Khan* it was recognized that strict application of the traditional exceptions to the hearsay rule is inflexible and could lead to the loss of much valuable evidence. The Supreme Court of Canada endorsed a new approach to the admission of hearsay evidence focusing on the necessity and reliability of the tendered evidence. If the hearsay evidence meets the dual requirements of necessity and reliability, it will be admitted under the principled approach to hearsay.

As a result of the decision in *Khan*, when considering the admissibility of hearsay evidence, the analysis should proceed as follows:

Does the evidence fit within one of the recognized exceptions to the exclusion of hearsay?

453 *R. v. Kearley*, [1992] 2 A.C. 226 (H.L.).

454 But see *R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont. C.A.), aff’d 104 C.C.C. (3d) 136 (S.C.C.), where evidence that the accused received a number of calls requesting drugs was held to be necessary and reliable, and accordingly admissible under the principled approach to hearsay.

455 *R. v. Khan* (1990), 59 C.C.C. (3d) 92 at 100 (S.C.C.).

If not, is admission of the evidence necessary, and does it possess sufficient indicia of reliability such that it may be admitted under the principled exception to the hearsay rule?⁴⁵⁶

The rationale underlying the principled approach was articulated by Lamer C.J.C. in *R. v. Smith*:

In my view, it would be neither sensible nor just to deprive the jury of this highly relevant evidence on the basis of an arcane rule against hearsay, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement, made under circumstances of which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross-examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis.⁴⁵⁷

The principled approach to the admission of hearsay is consistent with similar evolutions in the law of evidence in recent years.⁴⁵⁸ The Supreme Court of Canada has emphasized that in determining the admissibility of hearsay evidence, it is important to focus upon the principles underlying the admissibility of evidence, rather than trying to fit the evidence into traditional exceptions to rules.⁴⁵⁹

A brief review of the facts in *Khan* is in order. Khan was a doctor charged with sexually assaulting a three year old female patient. The victim and her mother went to see Khan. The victim was left alone with Khan for a short period of time for an examination. Thirty minutes after the examination, the victim disclosed to her mother in a very natural conversation that Khan had sexually assaulted her.⁴⁶⁰ At trial, the judge held that the victim was incompetent to testify and refused to admit the victim's statement through her mother, as it did not fit within any of the established exceptions to the hearsay rule. Khan was acquitted. The Ontario Court of Appeal allowed a Crown appeal and ordered a new trial.⁴⁶¹ The Court of Appeal held that the victim's statement should have been admitted

⁴⁵⁶ See *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

⁴⁵⁷ *R. v. Smith* (1992), 75 C.C.C. (3d) 257 at 272 (S.C.C.).

⁴⁵⁸ Privilege: *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 (S.C.C.); Similar Act evidence: *R. v. B.(C.R.)* (1990), 55 C.C.C. (3d) 1 (S.C.C.); *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.).

⁴⁵⁹ *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.); *R. v. Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.).

⁴⁶⁰ The gist of the conversation between the mother and her daughter was essentially the following. The mother asked the victim what she and Khan had talked about. The victim stated, "He asked me if I wanted a candy. I said yes... He said "open your mouth, and you know what? He put his birdie in my mouth, shook it and peed in my mouth." When asked whether she was lying, the victim stated, "No. He put his birdie in my mouth. And he never did give me my candy."

⁴⁶¹ *R. v. Khan* (1998), 42 C.C.C. (3d) 197 (Ont. C.A.).

on the basis that the spontaneous declarations exception to the hearsay rule should be relaxed for child witnesses.

Khan's appeal to the Supreme Court of Canada was dismissed, but not for the reasons of the Ontario Court of Appeal. McLachlin J. writing for the Court held that the victim's statement did not fit within any of the established exceptions to the hearsay rule, including the exception for spontaneous declarations. Rather, the victim's statement was admissible based on the application of principles that are common to all exceptions to the hearsay rule, necessity and reliability.

McLachlin J. interpreted necessity as being "reasonably necessary."⁴⁶² Here, the mother's statement was necessary because the trial judge determined that the declarant, the child victim, was incompetent to testify. Other circumstances which may satisfy the necessity requirement range from the fact that the declarant is deceased, ill, or otherwise unavailable.⁴⁶³ Accordingly, if the evidence is not otherwise admissible, necessity may be established.⁴⁶⁴

The reliability of the tendered evidence is to be determined on a case-by-case basis. In practice, the reliability requirement is the most difficult to satisfy. In the context of the fact situation presented in *Khan*, McLachlin J. held that the factors relevant to the reliability of hearsay evidence include the timing of the disclosure, demeanour and personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication. Factors relevant to the reliability of a tendered hearsay statement will vary depending upon the circumstances of the particular case.

The reliability requirement was further discussed in *R. v. Smith*.⁴⁶⁵ In *Smith*, it was made clear by Lamer C.J.C. writing for the Court that the principles articulated in *Khan* regarding the admissibility of hearsay evidence where the evidence is found to be necessary and reliable is a principle of general application, and not limited solely to the context of statements by children of tender years.

However, *Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and exceptions to it. What is important is the departure signaled by *Khan*

⁴⁶² *R. v. Khan* (1990), 59 C.C.C. (3d) 92 at 104-105 (S.C.C.).

⁴⁶³ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 195.

⁴⁶⁴ *R. v. Khan* (1990), 59 C.C.C. (3d) 92 at 101, 104-105 (S.C.C.).

⁴⁶⁵ *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.).

from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. The preliminary determination of reliability is to be made exclusively by the trial judge before the evidence is admitted.

This court's decision in *Khan*, therefore, signaled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

With respect to reliability, Lamer C.J.C. observed that the reliability of an out-of-court statement is a function of the circumstances under which it was made. Traditionally, cross-examination of a witness on his or her statement is considered the best means of ensuring the reliability of admissible evidence. Hearsay evidence was seen as inherently unreliable because the declarant is not present in court to be cross-examined with respect to the recognized "hearsay dangers": perception, memory, ability to communicate and sincerity. However, "if a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable," *i.e.* a circumstantial guarantee of trustworthiness is established." In these circumstances, cross-examination may be superfluous, and the hearsay evidence admissible.

(iii) Prior Inconsistent Statements

In *R. v. B.(K.G.)*⁴⁶⁶ ["K.G.B."], the Supreme Court of Canada applied the principled approach to the admission of hearsay to fashion a new exception for the admissibility of the prior inconsistent statements of a witness other than an accused for the truth of their contents. Prior to *K.G.B.*, unless a witness adopted his prior statement and acknowledged its truth, the evidential value of the statement was limited to impeaching the witness' credibility.

In *K.G.B.*, the victim and his brother got into a fight with four youths, one of whom was the accused. The accused stabbed the victim to death during the confrontation. Prior to trial the three youths each gave separate videotaped statements to the police implicating the

⁴⁶⁶ *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.). See also *R. v. U.(F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.).

accused. At trial, all three refused to adopt their statements. They claimed that they did not see or remember how the victim was killed. While being cross-examined on their prior statements pursuant to section 9 of the *Canada Evidence Act (CEA)*, they admitted giving the statements, but denied that they were true.

Without the three statements, the only evidence of identification was the dock identification of the accused by the victim's brother, which was poor at best. The trial judge noted that although he believed the three witnesses had lied during their testimony, and that their statements to the police were true, pursuant to the common law statements could be used to test their credibility. The accused was acquitted and a Crown appeal to the Ontario Court of Appeal was dismissed.

The Supreme Court of Canada allowed the Crown's appeal. Lamer C.J.C. wrote the majority decision. He held that prior inconsistent statements of a witness are admissible on a principled basis, *i.e.* where the dual requirements of necessity and reliability are met. These requirements are to be established during a *voir dire*, often referred to as a "*K.G.B.* Application."

Lamer C.J.C. reaffirmed that the necessity requirement must be given a flexible definition.⁴⁶⁷ Necessity is established where the declarant is unavailable, or where it can not be expected, again or at this time, to get evidence of the same value or from the same or other sources. With prior inconsistent statements, necessity is established because the recanting witness "holds the prior statement hostage."⁴⁶⁸ It is not possible to get the same evidence from the witness or from another source.

Establishing the reliability of a prior inconsistent statement is the most significant aspect of the *K.G.B.* Application. Traditionally, the limit on the use of prior inconsistent statements to impeaching the credibility of the witness was due to the perceived "hearsay dangers":

- the absence of an oath;
- the lack of opportunity to observe the declarant's demeanour; and
- the absence of contemporaneous cross-examination.

⁴⁶⁷ *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 at 295 (S.C.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 at 271 (S.C.C.).

⁴⁶⁸ *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 at 296 (S.C.C.).

Before substantive use can be made of a prior inconsistent statement, the party tendering it must establish that the circumstances surrounding the taking of the statement provide sufficient indicia of reliability, or amount to sufficient substitutes for the oath, presence and cross-examination before the trier of fact.

To be substantively admissible, the prior inconsistent statement must have been made under oath, solemn affirmation or a promise to tell the truth, followed by a warning to the witness regarding possible prosecution if the witness lied. Alternatively, there may be other circumstances which may serve to impress upon the witness the importance of telling the truth.

The opportunity to observe the witness' demeanour while giving the statement is satisfied where the prior statement is videotaped. Again, other circumstances may provide a sufficient substitute to the opportunity to observe the witness, such as the testimony of an independent third party who observed the taking of the statement.

The lack of cross-examination is the most significant of the hearsay dangers. This danger is obviously addressed in the context of prior inconsistent statements, because the maker of the statement is present in court and may be cross-examined on his or her recollection, testimonial capacity and bias/sincerity at the time the statement was made.

(1) The *Voir Dire* or “K.G.B. Application”

As noted above, admissibility of a prior inconsistent statement for the truth of its contents must be established on a *voir dire*. The procedure was outlined by Lamer, C.J.C.;⁴⁶⁹

- The calling party must first satisfy the requirements under s. 9 *Canada Evidence Act* (CEA).
- The party must then state its intention regarding the use of the statement. If it is only intended to use the statement to impeach the witness, that is the end of the matter. If the party wishes to make substantive use of the statement, notice must be provided. The *voir dire* will continue.
- The party must establish that sufficient indicia of reliability or acceptable substitutes for the oath, presence and contemporaneous cross-examination are present. The burden of proof is on a balance of probabilities.

⁴⁶⁹ R. v. B. (K.G.) (1993), 79 C.C.C. (3d) 257 at 297-300 (S.C.C.).

- The party must establish that the prior inconsistent statement is otherwise admissible, *i.e.* that it was voluntarily made and was not otherwise hearsay.

(iv) Admissions

(1) Generally

Out-of-court admissions made by the defendant are admissible for the truth of their contents as an exception to the hearsay rule. Such admissions may be oral, admissions by conduct, or implied.

Unlike other exceptions to the hearsay rule, the substantive use of an admission is not justified on the basis of the inherent trustworthiness or reliability of an admission. Rather, the rationale for their admissibility is rooted in our adversarial system of justice: what the defendant has previously stated can be admitted against the defendant “in whose mouth it does not lie to complain of the unreliability of his or her own statements.”⁴⁷⁰

Before a statement allegedly made by the defendant will be received in evidence the prosecutor must prove, based on admissible evidence, that the defendant made the admission. The onus of proof is on a balance of probabilities.⁴⁷¹ The trial justice retains, however, a general discretion to exclude the admission where its probative value is outweighed by its prejudicial effect.⁴⁷² Once received, the admission may be considered along with the balance of the evidence to determine the defendant’s guilt.

The defendant need not have personal knowledge of the facts or contents of his or her admission.⁴⁷³ Thus, evidence that would be inadmissible as hearsay if tendered through a non-party witness may be received if it is contained within the admission of the defendant. Recall that the primary hearsay danger is the lack of opportunity to cross-examine the declarant. This danger does not apply to admissions. Presumably, in choosing to rely on the hearsay in making the admission, the defendant has satisfied himself or herself of the reliability of the statement, or at least has had the opportunity to do so. All that is required is that in making the admission, the defendant expresses a belief in or an acceptance of the truth of what he or she was told.

⁴⁷⁰ *R. v. Evans* (1993), 85 C.C.C. (3d) 97 at 104 (S.C.C.).

⁴⁷¹ *R. v. Evans* (1993), 85 C.C.C. (3d) 97 at 106-107 (S.C.C.); *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 at 297 (S.C.C.).

⁴⁷² *R. v. Terry* (1996), 106 C.C.C. (3d) 508 (S.C.C.).

⁴⁷³ *R. v. Streu* (1989), 48 C.C.C. (3d) 321 (S.C.C.).

(2) Admissions by Conduct

As noted above, the conduct of the defendant may constitute an admission. The focus of the inquiry is whether the defendant's conduct evidences a particular state of mind or belief, or if it evidences an acceptance of what has been said in the defendant's presence. A simple example of an admission by conduct is where the defendant nodded his or head while a statement was made in his or her presence.

The most common example of an admission by conduct is evidence of post offence conduct.⁴⁷⁴ In *R. v. Peavoy*, the value of post offence conduct, or "after-the-fact conduct," was described in the following terms:

Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person. The after-the-fact conduct is said to indicate an awareness on the part of the accused person that he or she has acted unlawfully and without a valid defence for the conduct in question. It can only be used by the trier of fact in this manner if any innocent explanation for the conduct is rejected.⁴⁷⁵

(3) Admissions through Silence

In certain circumstances, an admission may be implied from the defendant's silence. In particular, where a statement is made by a third party in the presence of the defendant, the defendant heard and understood the statement, and the circumstances give rise to a reasonable expectation that the defendant should reply, silence may permit an inference of agreement.⁴⁷⁶ Thus, if it would be reasonable to expect the defendant to deny the substance of an accusation, the failure to do so could indicate that the defendant acknowledges responsibility, constituting an implied admission against the defendant.⁴⁷⁷

⁴⁷⁴ See *R. v. White* (1998), 125 C.C.C. (3d) 385 (S.C.C.); *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.). See also "Circumstantial Evidence," Section 4.11.4.b.

⁴⁷⁵ *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 at 238 (Ont. C.A.).

⁴⁷⁶ *R. v. Baron* (1976), 31 C.C.C. (2d) 525 (Ont. C.A.).

⁴⁷⁷ *R. v. Warner* (1994), 94 C.C.C. (3d) 540 (Ont. C.A.).

Note, however, that silence in the face of an accusation from a police officer or other state agent should not be considered an implied admission.⁴⁷⁸ One of the fundamental principles of our criminal justice system is the right to remain silent until there is a case to meet. Construing a defendant's silence in the face of an accusation from a police officer is inconsistent with this right.

(v) Declarations Against Interest

(1) Declarations against Pecuniary or Proprietary Interest

Written or oral statements of third parties that are contrary to that party's pecuniary or proprietary interest may be admitted as an exception to the hearsay rule. The prerequisites for admissibility are:⁴⁷⁹

- the third party declarant is deceased or otherwise unavailable to testify;
- the statement, when made, was against the declarant's pecuniary or proprietary interest; and
- the declarant had personal knowledge of the facts stated.

The rationale underlying this exception is based on the theory that a person would not knowingly say something that would harm his or her pecuniary or proprietary interests unless the person knew that the statement was true.⁴⁸⁰ Thus, the third party statement is imbued with a circumstantial guarantee of truth.

(2) Declarations against Penal Interest

Generally, a declaration against penal interest is a statement of the declarant which tends to incriminate the declarant, and often amounts to a full confession to the offence in consideration.⁴⁸¹ The obvious value of such a statement for the defendant is that it tends to exculpate the defendant.

While declarations against pecuniary or proprietary interest have always been recognized at common law, until recently the courts were slow to accept declarations against penal interest as a valid hearsay exception. This is due to the danger of fabrication which accompanies many confessions. Given the risk of fabrication, it could not be said that

⁴⁷⁸ *R. v. Eden*, [1970] 3 C.C.C. 280 (Ont. C.A.); *R. v. Conlon* (1990), 1 O.R. (3d) 188 (Ont. C.A.).

⁴⁷⁹ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 261-262.

⁴⁸⁰ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 201..

⁴⁸¹ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 262.

third party confessions generally could be admitted as an exception to the hearsay rule. Not until the Supreme Court of Canada's decision in *R. v. O'Brien* were declarations against penal interest recognized as a valid hearsay exception in Canadian law. In *O'Brien*, it was observed that "a person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook."⁴⁸²

Declarations against penal interest may be admitted in the following circumstances:⁴⁸³

- the declaration was made in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result;
- the vulnerability to penal consequences cannot be remote;
- the declaration sought to be given in evidence must be considered in its totality. If upon the whole tenor the weight is favour of the declarant, it is not against his interest;
- in a doubtful case a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused; and
- the declarant would have to be unavailable by reason of death, insanity, grave illness which prevents the giving of testimony even from a bed, or absence in a jurisdiction to which none of the processes of the Court extend.⁴⁸⁴

Note that statements against penal interest are admissible only at the behest of the defendant. They may be admitted only if exculpatory of the defendant, but not where they are inculpatory.⁴⁸⁵

⁴⁸² *R. v. O'Brien* (1978), 35 C.C.C. (2d) 209 at 215 (S.C.C.).

⁴⁸³ *R. v. Demeter* (1978), 34 C.C.C. (2d) 137 at 141-142 (S.C.C.); *R. v. Lucier* (1982), 65 C.C.C. (2d) 150 (S.C.C.).

⁴⁸⁴ With respect to the unavailability requirement, see *R. v. Agawa* (1975), 28 C.C.C. (2d) 379 (Ont. C.A.); and *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.).

⁴⁸⁵ *R. v. Lucier* (1982), 65 C.C.C. (2d) 150 (S.C.C.).

(vi) Dying Declarations

The dying declaration of a deceased third party may be admitted where the declaration concerned the circumstances of his or her impending death, and was made under a settled hopeless expectation of death. As dying declarations are only admissible in cases of culpable homicide,⁴⁸⁶ this exception has no application in proceedings commenced by way of certificate of offence.

(vii) Declarations made in the Course of Business or Duty**(1) Generally**

Declarations made in the course of duty may be admitted as an exception to the hearsay rule at common law, and pursuant to the *Ontario Evidence Act (OEA)*. In practice, the statutory exception provided in the *OEA* has overtaken the common law exception.

The rationale underlying this exception at both common law and statute is based on the circumstantial guarantee of trustworthiness inherent in business records. First, the records are produced contemporaneously with the act or event recorded, and as a matter of routine, enhancing accuracy. Second, the records produced are relied upon by the business; the threat of dismissal by the employer encourages accurate record keeping.

(2) Common Law

As a result of the decision of the Supreme Court of Canada in *Ares v. Venner*,⁴⁸⁷ the test for admission of business records at common law is the following. The record must have been made reasonably contemporaneously with the act or event recorded, in the ordinary course of duty, and by someone who had personal knowledge of the act or event, was under a duty to observe and record the act or event and had no motive to misrepresent the matters recorded.

Note that admissibility of business records is not dependent upon the ability of the opposing party to cross-examine the maker of the records.

(3) Section 35 Ontario Evidence Act

Statutory reform in the *Canada Evidence Act (CEA)* and the *Ontario Evidence Act (OEA)* has reduced the relevance of the common law business records exception. Admissibility

⁴⁸⁶ *R. v. Schwartzenhauer* (1935), 64 C.C.C. 1 (S.C.C.); *R. v. Jurtyn* (1958), 121 C.C.C. 403 (Ont. C.A.).

⁴⁸⁷ *Ares v. Venner*, [1970] S.C.R. 608.

of business records in Ontario is governed by s. 35 of the *Ontario Evidence Act (OEA)*.

Section 35 provides:

35. (1) In this section, “business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; (“enterprise”) “record” includes any information that is recorded or stored by means of any device. (“document”)

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party’s intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

Accordingly, the criteria for admissibility of business records pursuant to s. 35 *Ontario Evidence Act (OEA)* are the following:

- the record was made reasonably contemporaneously with the act or event recorded;
- the record was made in the usual and ordinary course of the business;⁴⁸⁸
- the person who made the record was under a duty to do so⁴⁸⁹; and
- the party tendering the record provides a minimum of seven days notice to the

488 See *Johnson v. Lutz*, 253 N.Y. 124 (C.A.) (1930); *Selak v. Burroughs* (1977), 15 O.R. (2d) 750 (H.C.); *Woods et al. v. Elias et al.* (1978), 21 O.R. (2d) 840 (Co. Ct.).

489 See *R. v. Lavery* (No. 2) (1979), 47 C.C.C. (2d) 60 (Ont. C.A.).

opposite party.⁴⁹⁰

Note that subsection 35(4) *OEA* modifies the common law business record exception. At common law, business records are not admissible if made by a person who did not have personal knowledge of the act or event recorded, or who had a motive to fabricate. Section 35(4) provides that the circumstances of the making of the record, including lack of personal knowledge of the record-maker, affect the weight but not the admissibility of the record. Accordingly, the provision allows double-hearsay, as long as the person who provided the record-maker with the information recorded was also under a duty to observe and record the act or event.⁴⁹¹

Section 35(4) *OEA* has also been interpreted to require the admission of a record even where a motive to fabricate is present. However, the trier of fact is entitled to attach no weight to the record in such circumstances.⁴⁹²

(viii) *Res Gestae* or Spontaneous Exclamations

Res Gestae, translated literally means “things done” or “thing transacted.”⁴⁹³ The *res gestae* exception provides that where a remark is made spontaneously and concurrently with an incident or occurrence, the remark is essentially part of the occurrence and is admissible. The spontaneous nature of the remark reduces the possibility of concoction, and accordingly the remark carries an inherent degree of trustworthiness.

There are a number of sub-categories of spontaneous exclamations.

(1) *Statements of Bodily Feelings and Condition*

Where a third party declarant claims to be experiencing a particular physical condition, the statement is admissible, but only to prove the declarant was experiencing the condition at the time and to establish its duration. The statement is not admissible to prove the cause of the physical condition.⁴⁹⁴

490 See *R. v. Tecoglas, Inc. v. Domglas, Inc.* (1985), 51 O.R. (2d) 196 (H.C.); *Exhibitors Inc. v. Allen* (1989), 70 O.R. (2d) 103 (H.C.).

491 *Johnson v. Lutz*, 253 N.Y. 124 (C.A.) (1930); *Setak v. Burroughs* (1977), 15 O.R. (2d) 750 (H.C.); *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.* (1994), 20 O.R. (3d) 429 (Gen.Div.).

492 *Setak v. Burroughs* (1977), 15 O.R. (2d) 750 (H.C.).

493 H.C. Black, *Black's Law Dictionary* 6th ed. (St. Paul: West, 1990) at 1305.

494 D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 266; D. Paciocco and L. Streusser, *The Law of Evidence in Canada* (Concord: Irwin, 1996) at 105.

(2) State of Mind or Present Intention

The statement of a third party declarant describing the declarant's present state of mind is admissible where the declarant's state of mind is relevant to an issue in the case.⁴⁹⁵ The statement is not admissible as proof of the facts giving rise to that state of mind, or the factual assertions contained within the statement.⁴⁹⁶

In *R. v. P.(R.)*, Doherty J. (as he then was) summarized this exception in the following passages:⁴⁹⁷

Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred.

Evidence of the deceased's state of mind may, in turn, be relevant as circumstantial evidence that the deceased subsequently acted in accordance with that avowed state of mind. Where a deceased says, "I will go to Ottawa tomorrow." the statement affords direct evidence of the state of mind – an intention to go to Ottawa tomorrow – and circumstantial evidence that the deceased in fact went to Ottawa on that day. If either the state of mind, or the fact to be inferred from the existence of the state of mind is relevant, the evidence is receivable subject to objections based on undue prejudice.

An utterance indicating that a deceased had a certain intention or design will afford evidence that the deceased acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so. The reasonableness of the inference will depend on a number of variables including the nature of the plan described in the utterance, and the proximity in time between the statement as to the plan and the proposed implementation of the plan.

The rules of evidence as developed to this point do not exclude evidence of utterances by a deceased which reveal her state of mind, but rather appear to provide specifically for their admission where relevant. The evidence is not, however, admissible to show the state of mind of persons other than the deceased (unless they were aware of the statements), or to show that persons other than the

495 *R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.).

496 *R. v. Smith* (1992), 75 C.C.C. (3d) 257 at 265-266 (S.C.C.).

497 *R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 at 343-344 (Ont. H.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 at 266 (S.C.C.).

deceased acted in accordance with the deceased's stated intentions, save perhaps cases where the act was a joint one involving the deceased and another person. The evidence is also not admissible to establish that past acts or events referred to in the utterances occurred.

(3) *Spontaneous Exclamations*

A statement made by a third party declarant relating to a startling event may be admitted to prove the truth of its contents. The statement may have been made before or after the event, but it must have been made while the declarant was under stress or excitement caused by the event.⁴⁹⁸ In determining admissibility, the Court will be concerned with whether the statement was made before the declarant had time to devise or concoct anything.⁴⁹⁹

4.11.9 Statements

a. *Generally*

Statements made by a defendant may be persuasive evidence of the defendant's guilt of the offence charged. Often, such statements amount to a confession. A statement made by a defendant is an admission by a party to the proceedings, and may be received in evidence against the defendant as an exception to the hearsay rule.

Statements made by the defendant may be divided into two categories; statements made to persons in authority; and statements made to non-authority figures. Before a statement made to a person in authority will be admitted, the prosecutor must establish beyond a reasonable doubt that it was made voluntarily. This is commonly referred to as the confession rule. Voluntariness should be determined on a *voir dire*, unless the defendant concedes that the statement was made voluntarily.⁵⁰⁰

A finding that the making of the statement was voluntary may not be determinative of its admissibility. Notwithstanding a finding of voluntariness, a statement may be excluded where the circumstances surrounding the taking of the statement violated the defendant's *Charter* rights, most commonly the defendant's right to counsel.

Statements made by a defendant to persons who are not in a position of authority do not

498 *R. v. Clark* (1983), 7 C.C.C. (3d) 46 (Ont. C.A.).

499 *R. v. Clark* (1983), 7 C.C.C. (3d) 46 (Ont. C.A.); *R. v. Schwartz* (1978), 40 C.C.C. (2d) 161 (N.S. C.A.)

500 *R. v. Park* (1981), 59 C.C.C. (2d) 385 at 390 (S.C.C.).

implicate the confession rule. Accordingly, they may be received by the court as admissions made by the defendant without establishing the voluntariness of the statement on a *voir dire*. Moreover, statements made to non-government actors do not implicate the defendant's *Charter* rights.

Additionally, the prosecutor need not prove the voluntariness of the statement where the making of the statement constitutes the *actus reus* of the offence.⁵⁰¹

b. The Confession Rule

The confession rule is this: no statement by a defendant is admissible in evidence against him or her unless the prosecutor proves beyond a reasonable doubt that the statement was made voluntarily. The voluntariness of a confession is a question of law.⁵⁰²

Voluntariness in this context means that the statement has not been obtained from the defendant "either by fear of prejudice or hope of advantage exercised or held out by a person in authority."⁵⁰³ Additionally, the statement must not have been taken in an atmosphere of oppression,⁵⁰⁴ and must have been the product of an "operating mind."⁵⁰⁵

Accordingly, the confession rule has five components:

- there must be an inducement in the form of either fear of prejudice or hope of advantage;
- a person in authority must have held out the fear of prejudice or hope of advantage;
- the statement was taken in an atmosphere of oppression;
- the inducement or atmosphere of oppression must have caused the statement; and
- the statement must have been the product of an operating mind.

501 *R. v. Stapleton*, [1982] 66 C.C.C. (2d) 231 (Ont. C.A.).

502 *R. v. Fitton* (1956), 116 C.C.C. 1 (S.C.C.).

503 *R. v. Ibrahim*, [1914], A.C. 599 at 609 (P.C.).

504 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.).

505 *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.).

The rationale underlying the confession rule is the need to ensure the reliability of statements.⁵⁰⁶ Secondary concerns are the need to ensure fairness in the criminal process, and the need to ensure that the defendant was able to make a choice whether to speak to the authorities.⁵⁰⁷ Due to the potentially decisive nature of a defendant's statement, the confession rule endeavors to ensure, by imposing a strict test for admissibility, that the defendant's statement is reliable and trustworthy evidence.⁵⁰⁸

(i) *Fear of Prejudice or Hope of Advantage*

A statement may be rendered involuntary where an inducement held out by a person in authority "excites" a fear of prejudice or hope of advantage which causes the statement to be made. To rebut an allegation that a statement was induced by threats or promises, the prosecutor does not have to prove that the statement was made spontaneously or that its making was uninfluenced by the questions or conduct of a person in authority.⁵⁰⁹ As the confession rule is concerned with the reliability of statements, a statement will be rendered involuntary only where the conduct or questioning of the person in authority could have induced the defendant to make a statement that was untrue.⁵¹⁰

The fear of prejudice or hope of advantage contemplated by the confession rule is usually related to the prosecution of the defendant. Fear of prejudice includes threats of reprisals, mistreatment or violence if a statement is not made. In particular, it does not include "fear of being caught or identified or a fear induced by the [defendant's] guilty conscience but a fear of reprisal" if the defendant failed to talk or give a statement.⁵¹¹ Hope of advantage includes promises of benefits in return for giving a statement.

(ii) *Oppression*

A statement may be rendered involuntary where it is taken in an atmosphere of oppression.⁵¹²

The circumstances surrounding the taking of the statement may produce an atmosphere of oppression, thereby casting a doubt upon the voluntariness of the statement. This may

506 *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 at 24 (S.C.C.); see also *Boudreau v. R.* (1949), 94 C.C.C. 1 at 8-9 (S.C.C.), where the need to ensure the reliability of statements is discussed

507 *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 at 24 (S.C.C.).

508 Watt D., *Watt's Manual of Criminal Evidence*. 1998 (Toronto: Carswell, 1998) at 417.

509 *R. v. Fitton* (1956), 116 C.C.C. 1 (S.C.C.); *R. v. Alward* (1977), 32 C.C.C. (2d) 416 at 432 (N.B. C.A.), aff'd (1978), 35 C.C.C. (2d) 392 (S.C.C.).

510 *R. v. Alward* (1977), 32 C.C.C. (2d) 416 at 432 (N.B. C.A.), aff'd (1978), 35 C.C.C. (2d) 392 (S.C.C.).

511 *R. v. Alward* (1977), 32 C.C.C. (2d) 416 at 432 (N.B. C.A.), aff'd (1978), 35 C.C.C. (2d) 392 (S.C.C.).

512 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.); *R. v. Horvath* (1979), 44 C.C.C. (2d) 385 (S.C.C.).

be the case notwithstanding the absence of any illegal inducements held out by the person in authority who took the statement. Factors relevant to this inquiry include the time, place and length of the interrogation of the defendant, and the conduct of the person in authority that took the defendant's statement.⁵¹³ The issue is whether the circumstances would have led the defendant to believe that the person in authority would stop at nothing to obtain a satisfactory statement.⁵¹⁴

However, the defendant's own timidity or subjective fear of the person in authority will not render the statement involuntary unless there is a causal relationship between the conduct of the person in authority and the making of the statement.⁵¹⁵ While the defendant's state of mind at the time the statement was taken is a relevant factor, whether the conduct of the person in authority created an atmosphere of oppression is to be assessed objectively based upon all of the surrounding circumstances.

(iii) Person in Authority

The confession rule is implicated only where the defendant's statement was taken by a person in authority.

Generally, a person in authority is someone who was engaged in the arrest, detention, investigation or prosecution of the defendant.⁵¹⁶ Police officers, security guards, Crown Attorneys and prosecutors are persons in authority for the purpose of the confession rule.⁵¹⁷ Persons outside the group just mentioned may also be found to be persons in authority in exceptional circumstances.⁵¹⁸ A person in authority may be described as someone who is concerned with or may influence the prosecution of the defendant and has the power to fulfill any threats or promises. As a general rule, however, complainants and witnesses are not persons in authority.⁵¹⁹

513 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.).

514 *R. v. Ruffange*, [1965] 2 C.C.C. 37 (Que. C.A.).

515 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.).

516 *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 at 26 (Ont. C.A.); *R. v. Paonessa and Paquette* (1982), 66 C.C.C. (2d) 30 (Ont. C.A.); *R. v. Roadhouse* (1934), 61 C.C.C. 191 (B.C. C.A.).

517 *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 at 26 (Ont. C.A.).

518 Complainant may be person in authority: *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 at 26 (Ont. C.A.); *R. v. Kyle* (1991), 68 C.C.C. (3d) 286 (Ont. C.A.); *R. v. Downey* (1976), 32 C.C.C. (2d) 511 (N.S. C.A.); Social worker may be person in authority: *R. v. Sweryda* (1987), 34 C.C.C. (3d) 325 (Alta. C.A.).

519 *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 (Ont. C.A.).

Whether someone is a person in authority is a subjective test. The court must consider the defendant's subjective knowledge of the person's status.⁵²⁰ The defendant must have believed that the person who received the statement had authority over him or her when the statement was made.⁵²¹ Accordingly, where the defendant is unaware that he is speaking with a person in authority, as is the case where the defendant has made a statement to an undercover officer, the prosecutor does not have to prove the voluntariness of the statement.⁵²²

(iv) Operating Mind

For the statement to be voluntary, the prosecutor must prove that the statement was the product of an operating mind.

The focus of the operating mind test is upon whether the defendant had the capacity to choose to make a statement. This was made clear in *R. v. Whittle*:

The operating mind test, therefore, requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused. In determining the requisite capacity to make an active choice, the relevant test is: Did the accused possess an operating mind? It goes no further and no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her interest.⁵²³

The prosecutor does not have to prove that the defendant was capable of making a good choice; it must only be proved that the defendant was capable of understanding that his or her statement could be used in evidence against him or her.⁵²⁴

To address the need to ensure that defendants are aware of the consequences of giving a statement, the practice of giving the defendant a caution before taking a statement developed at Common Law.⁵²⁵

⁵²⁰ *R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.); *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 (Ont. C.A.).

⁵²¹ *R. v. B.(A.)* (1986), 26 C.C.C. (3d) 17 at 26 (Ont. C.A.).

⁵²² *R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.).

⁵²³ *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.); see also *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.), rev'd without reference to this point 110 C.C.C. (3d) 382 (S.C.C.).

⁵²⁴ *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.); See also *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at 210-211 (S.C.C.).

⁵²⁵ See the comments of McIntyre J. in *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at 210-211 (S.C.C.).

The caution typically is a variation of the following: you have the right to remain silent; anything you say may be taken down in writing and used as evidence. Again, to be aware of the consequences "simply means to be capable of understanding that [his or] her statement could be used in evidence in proceedings to be taken against [him or] her."⁵²⁶ Accordingly, the fact that the defendant was not cautioned before giving a statement, although an important factor, is not decisive.⁵²⁷

A statement may also be rendered involuntary where the person in authority used trickery to elicit it. The concern here is that the use of trickery may have robbed the defendant of the choice of whether to make the statement or remain silent.⁵²⁸ The court will consider whether the conduct of the person in authority deprived the defendant of the right to make an effective choice by reason of:

- coercion;
- trickery;
- misinformation; or
- lack of information.⁵²⁹

However, the burden of proving the voluntariness of a statement in the face of an allegation that the police used dirty tricks is not onerous. A statement will be excluded only where the conduct or words of the person in authority would induce the defendant to make a statement which might be untrue,⁵³⁰ or if the influence exerted by the person in authority was so overbearing that the defendant "lost any meaningfully independent ability to choose to remain silent", and was "a mere tool in the hands of the police."⁵³¹

c. Language Comprehension

The capacity of the defendant to speak and understand the language in which the statement was taken may raise the issue of whether the statement was made voluntarily.⁵³² Where the voluntariness of the defendant's statement is challenged on the basis that the defendant did not understand the language in which he or she was

⁵²⁶ *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at 210-211 (S.C.C.).

⁵²⁷ *R. v. Boudreau* (1949), 94 C.C.C. 1 at 3 (S.C.C.).

⁵²⁸ *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.), rev'd without reference to this point 110 C.C.C. (3d) 382 (S.C.C.).

⁵²⁹ *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.), rev'd without reference to this point 110 C.C.C. (3d) 382 (S.C.C.).

⁵³⁰ *R. v. Alward* (1977), 32 C.C.C. (2d) 416 at 432 (N.B. C.A.), aff'd (1978), 35 C.C.C. (2d) 392 (S.C.C.).

⁵³¹ *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.), rev'd without reference to this point 110 C.C.C. (3d) 382 (S.C.C.).

⁵³² *R. v. Lapointe* (1983), 9 C.C.C. (3d) 366 (Ont. C.A.), aff'd 35 C.C.C. (3d) 366 (S.C.C.).

questioned, the only determination to be made by the court is whether the defendant's understanding and ability to communicate was so deficient that it was impossible for the defendant to have understood the person in authority, or to have made any statements in the language in which he or she was questioned.

d. Statements Made Under Compulsion of Statute

A statement made under compulsion of a provincial statute is not thereby rendered inadmissible in criminal proceedings.⁵³³ Accordingly, a statement given by the driver of a motor vehicle involved in an accident required under provincial motor vehicle legislation is not involuntary solely because it was made under statutory compulsion.⁵³⁴

However, in the decision *R. v. Joann Kimberley White*, [1999] S.C.J. No. 28 the Supreme Court of Canada held that the admission into evidence of statements made under compulsion of the *Motor Vehicle Act* offended the principle against self-incrimination embodied in s. 7 of the *Charter*.

e. The Voluntariness Voir Dire and Waiver

Generally, the voluntariness of the defendant's statement should be determined during a *voir dire*. However, a statement made by a defendant to a person in authority may be admitted without the necessity of a *voir dire* where the *voir dire* is waived by the defendant.⁵³⁵ Waiver of the *voir dire* constitutes an admission by the defendant that the statement was made voluntarily.

The admissibility of the statement is a matter of discretion for the court. Accordingly, notwithstanding the defendant's waiver of the voluntariness *voir dire*, the court may:

- accept the waiver and dispense with the holding of the *voir dire*;
- hold a *voir dire*; or
- make inquiries directly of the defendant or her counsel to ascertain the defendant's understanding of the admissions implicit in the waiver of the *voir dire*.

533 *R. v. Marshal* (1961), 129 C.C.C. 232 (S.C.C.).

534 *R. v. Bossman* (1984), 15 C.C.C. (3d) 251 (Alta. C.A.).

535 *R. v. Park* (1981), 59 C.C.C. (2d) 385 at 390 (S.C.C.).

(i) Conduct of the Voluntariness Voir Dire

In determining the voluntariness of the statement, the court is to look at all of the surrounding circumstances,⁵³⁶ including the state of mind of the defendant.⁵³⁷

Before the statement will be admitted, it must be proved voluntary⁵³⁸ beyond a reasonable doubt. Accordingly, the prosecutor must present evidence on the *voir dire* in support of the admissibility of the statement. This involves calling as witnesses the person(s) in authority who took the defendant's statement, or any witnesses who were present when the statement was made, for the purpose of describing the circumstances surrounding the taking of the statement. In the typical provincial offences prosecution, the provincial offences officer or police officer that issued the certificate of offence will be called as a witness. Once the prosecutor has completed its examination-in-chief of the officer, the defendant may cross-examine the officer.

For the purposes of determining the admissibility of the statement on the *voir dire*, the prosecutor does not have to satisfy the court that the defendant made the statement. The court must only be satisfied that there is "some evidence" that the statement was made by the defendant.⁵³⁹ Only after the statement has been ruled voluntary and admissible will the court in its capacity as trier of fact consider whether the statement was actually made by the defendant.

Depending upon the circumstances of the particular case, the prosecutor should inquire into the following issues during the *voir dire*:

- Was the statement taken verbatim?
- Where was the statement taken?
- Was the defendant under arrest when the statement was taken?
- Was the defendant detained when the statement was taken?
- Was the defendant cautioned before taking the statement?
- Did the defendant express a desire not to give a statement?
- Was the officer in uniform?

536 *R. v. Boudreau* (1949), 94 C.C.C. 1 at 3 (S.C.C.); *R. v. Filton* (1956), 116 C.C.C. 1 at 5 (S.C.C.) (per Rand, J.).

537 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 at 292 (S.C.C.); *R. v. Ward* (1979), 44 C.C.C. (2d) 498 (S.C.C.).

538 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 at 293 (S.C.C.).

539 *R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.).

- How did the conversation start? Did the defendant offer information, or did the defendant respond to questions asked?
- Was the defendant offered any benefits or favours before taking the statement?
- Was the defendant threatened before taking the statement? Was there any physical contact between the defendant and person in authority at any time before or after taking the statement?
- Were other officers present when the statement was taken? If so, what were they doing?
- Was the defendant injured at the time he or she made the statement? If so, what was the nature of the injury?
- Did the defendant seem to understand the questions asked?
- Were the defendant's answers to questions responsive and coherent?
- Was the defendant under the influence of alcohol or drugs when the statement was taken?

The defendant may cross-examine any witnesses called by the prosecutor on the *voir dire*, and may also adduce independent evidence in support of the inadmissibility of the statement.

Additionally, the defendant may testify on the *voir dire* without prejudicing his or her right not to testify in the trial proper.⁵⁴⁰ If the defendant chooses to testify, the prosecutor may only ask the defendant questions related to the taking of the statement, including whether the statement is true or not.⁵⁴¹ However, the defendant's answer to the latter question is not admissible in the trial proper.⁵⁴²

f. Permissible use of Voluntary Statement by the Prosecutor

Once the court determines that the defendant's statement was made voluntarily, the statement is admissible against the defendant as proof of the truth of its contents, or for the purpose of testing the defendant's credibility during cross-examination.

⁵⁴⁰ *R. v. Erven* (1979), 44 C.C.C. (2d) 76 (S.C.C.).

⁵⁴¹ *R. v. De Clercq*, [1969] 1 C.C.C. 197 (S.C.C.).

⁵⁴² *R. v. Van Dongen* (1975), 26 C.C.C. (2d) 22 (B.C. C.A.).

Where the defendant's statement forms part of the prosecution case, the statement is admissible for or against the defendant and the prosecution. The statement is not admissible evidence, however, against a co-defendant.⁵⁴³

Where a statement made by the defendant relates to a basic issue involved in the trial and can not be said to be marginally, minimally or doubtfully relevant, it must be tendered by the prosecutor, if at all, as part of the prosecution case-in-chief. It is improper for the prosecutor not to introduce the statement as part of its case-in-chief, but then cross-examine the defendant on it and then prove it in rebuttal.⁵⁴⁴

Accordingly, where the defendant's statement has marginal, minimal or doubtful relevance to the prosecution case, the prosecutor may use the statement solely for the purpose of testing the credibility of the defendant during the cross-examination of the defendant without having introduced the statement as part of the prosecution case.⁵⁴⁵ Moreover, the prosecutor may wait until the defendant has started to answer the case against him or her before seeking to determine the voluntariness of the statement on a *voir dire*.⁵⁴⁶

g. Effect of Finding that Statement Not Made Voluntarily

If the court determines that the statement was not made voluntarily, the statement is not admissible as part of the prosecution case. Moreover, the prosecutor can not use the defendant's statement for any purpose, including challenging the credibility of the defendant during cross-examination.⁵⁴⁷

h. Admissibility of Statements made Subsequent to Involuntary Statement

While not automatically resulting in exclusion, an involuntary statement may taint any subsequent statement made by the defendant.⁵⁴⁸

If the admissibility of a subsequent statement is challenged, the prosecutor must prove beyond a reasonable doubt that any statement made by the defendant subsequent to an involuntary statement was made voluntarily. A prior involuntary statement may render a subsequent statement involuntary where there is a nexus between the making of the two

543 *R. v. C.(B.)* (1993), 80 C.C.C. (3d) 467 at 471 (Ont. C.A.).

544 *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 at 319-320 (Ont. C.A.).

545 *R. v. Drake* (1970), 1 C.C.C. (2d) 396 (Sask. Q.B.).

546 *R. v. Drake* (1970), 1 C.C.C. (2d) 396 (Sask. Q.B.); *R. v. Brooks* (1986), 28 C.C.C. (3d) 441 (B.C. C.A.).

547 *R. v. Hebert*, [1955] S.C.R. 120.

548 *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 at 293 (S.C.C.); *R. v. Horvath* (1979), 44 C.C.C. (2d) 385 at 426-427 (S.C.C.).

statements.⁵⁴⁹ The second statement will be inadmissible if it is simply a continuation of the first statement, or the first statement is a substantial contributing factor to the making of the second.⁵⁵⁰ Factors relevant to this inquiry include the "time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances."⁵⁵¹

The fact that the defendant was cautioned or spoke to a lawyer between the taking of the two statements is an important factor in favour of the admissibility of the second statement, but is not determinative.⁵⁵²

4.11.10 Identity

a. Generally

In every case, the prosecutor must prove that an offence was committed, and that the defendant before the court is the person who committed the offence. Identity of the offender can be established in a number of ways.

b. Eyewitness Identification

Identity can be established by the direct evidence of a witness who testifies that the defendant before the court is the person he or she observed commit the offence.

Despite its seemingly straightforward nature, identification through eyewitness testimony alone may be highly suspect. This is due to the recognized "frailties" of eyewitness evidence. In *R. v. Nikolovski*, Cory J. briefly discussed the frailties of eyewitness testimony in the following passage:

The courts have long recognized the frailties of identification evidence given by independent, honest and well meaning eyewitnesses. This recognized frailty served to emphasize the essential need to cross-examine witnesses. So many factors come into play with the human identification witness. As a minimum, it must be determined whether the witness was physically in a position to see the

⁵⁴⁹ *R. v. Horvath* (1979), 44 C.C.C. (2d) 385 (S.C.C.).

⁵⁵⁰ *R. v. I.(L.R.)* (1993), 86 C.C.C. (3d) 289 at 304-307 (S.C.C.).

⁵⁵¹ *R. v. I.(L.R.)* (1993), 86 C.C.C. (3d) 289 at 304 (S.C.C.); see also *R. v. Hobbins* (1982), 66 C.C.C. (2d) 289 (S.C.C.); and *R. v. Horvath* (1979), 44 C.C.C. (2d) 385 (S.C.C.).

⁵⁵² *R. v. I.(L.R.)* (1993), 86 C.C.C. (3d) 289 at 305-306 (S.C.C.); *Boudreau v. R.* (1949), 94 C.C.C. 1 at 25 (S.C.C.).

accused and, if so, whether that witness had sound vision, good hearing, intelligence and the ability to communicate what was seen and heard. Did the witness have the ability to understand and recount what had been perceived? Did the witness have a sound memory? What was the effect of fear or excitement on the ability of the witness to perceive clearly and to later recount the events accurately? Did the witness have a bias or at least a biased perception of the event or the parties involved? ⁵⁵³

It is apparent from the preceding passage that the physical and cognitive ability of witnesses to perceive, remember and relate what they have observed may vary, and further that the ability to do so may be affected in stressful situations. Experience has shown that witnesses have problems in perception and recall of any given event that was brief and stressful. ⁵⁵⁴

There are many factors which can potentially strengthen an eyewitness identification. The amount of time that a witness had to observe the offender is an important factor. An identification based upon a very short period of observation is deserving of less weight, ⁵⁵⁵ in contrast to observations made over a lengthy period of time. ⁵⁵⁶ An identification is also strengthened by evidence that the witness observed the offender for the specific purpose of identifying the offender later, or that the witness has seen the offender in the past and/or is familiar with the offender. ⁵⁵⁷

Ultimately, what must always be kept in mind when considering eyewitness testimony is the distinction between honesty and reliability. Equating honesty with reliability is a dangerous trap. A witness can be entirely honest and sincere in giving her testimony, but, due to the recognized frailties of eyewitness testimony, nevertheless be mistaken about the matters she believes she witnessed. ⁵⁵⁸

553 *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 at 412-413 (S.C.C.).

554 *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 at 394 (Ont. C.A.).

555 *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 at 256 (Ont. C.A.).

556 *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.).

557 *R. v. Todish* (1985), 18 C.C.C. (3d) 159 at 162-163 (Ont. C.A.).

558 *R. v. D.(A.)* (1990), 37 O.A.C. 267; *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 at 255 (Ont. C.A.); *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 at 383-384 (Ont. C.A.).

c. *Proof of Identity in the Absence of Direct Evidence*

In the majority of proceedings commenced by way of certificate of offence, the only witness called by the prosecution is the charging officer. Often, the charging officer has no recollection of what the offender looks like, and consequently is unable to provide direct evidence of identity. This situation arises because the officer can testify to apprehending and charging the person who committed the offence, and can give the name and address that the offender provided at the time, but due to the passage of time and the volume of charges cannot say that the defendant before the court is the offender.⁵⁵⁹ Fortunately, dock identification by the charging officer is not essential in criminal and quasi-criminal proceedings,⁵⁶⁰ and indeed, standing alone, is generally an undesirable and unsatisfactory form of identification.⁵⁶¹

Where the charging officer is unable to provide direct evidence of identity, proof of identity involves a two-step process:

- proof that the person who was apprehended at the time of the offence was the person who committed the offence, and
- proof that the defendant before the court is the person who was apprehended at the time of the offence.⁵⁶²

Obviously, this two-step process is not engaged where a witness other than the charging officer is available to testify that he or she observed the defendant commit the offence.

In *R. v. Hunt*,⁵⁶³ the Ontario Court of Appeal determined that *prima facie* proof of identity is established in Part I proceedings where:

- the offender is apprehended at or near the scene of the offence;
- the offender identifies herself with a valid driver's licence;
- the offender is served with an offence notice;
- the officer certifies on the certificate of offence that he personally served the offence notice on the person charged;

⁵⁵⁹ Ontario, Ministry of the Attorney General, *Handbook for Prosecutors*, 3d ed., by B.W. Long (Toronto: Queen's Printer, 1994) at E11-1.

⁵⁶⁰ *R. v. Nicholson* (1984), 12 C.C.C. (3d) 228 (Alta. C.A.), leave to appeal to S.C.C. refused, 12 C.C.C. (3d) 228n; *R. v. Blandizzi* (1998), 37 M.V.R. (3d) 240 (Ont. Ct. (Gen. Div.)).

⁵⁶¹ See *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 at 256 (Ont. C.A.).

⁵⁶² Ontario, Ministry of the Attorney General, *Handbook for Prosecutors*, 3d ed., by B.W. Long (Toronto: Queen's Printer, 1994) at E11-1.

⁵⁶³ *R. v. Hunt* (1986), 18 O.A.C. 78.

- the offence notice is subsequently *signed* and returned to the court office, indicating the offender's intention to plead not guilty to the offence;
- the notice of trial is sent to the address provided on the offence notice;
- the offender subsequently appears before the court to answer the charge; and
- the officer gives the offender's name in court.

The presence of all the preceding elements is sufficient to establish identity. However, it is not necessary that all elements be present. For example, proof that the offender identified himself to the charging officer with a valid driver's licence at the time he was charged, the offender's name is sufficiently distinctive, and the offender appears in court to answer the charge may be sufficient to prove identity beyond a reasonable doubt in the absence of evidence to the contrary.⁵⁶⁴ Whether the evidence is sufficient to prove identity beyond a reasonable doubt depends upon the circumstances of the particular case. This is apparent from the comments of McIntyre J.A. in *R. v. Chandra*:

In my opinion, mere identity of name affords some evidence of identity of a person. When accompanied by other factors such as the relative distinctiveness of the name, or the fact that it is coupled with an address, or appears upon a licence or other document of significance, its weight is strengthened. The trier of fact when such evidence is before it, whether Judge alone or jury must consider it, weigh it and reach its determination. When such evidence is adduced to the trier of fact it cannot be said there is no evidence.⁵⁶⁵

d. Videotape and Photographic Evidence

In *R. v. Nikolovski*, it was held that identity may also be determined solely on the basis of a videotape taken of the offence. Once it is established that the videotape has not been altered or changed, and that it depicts the scene of a crime, it may be used by the trier of fact to determine whether the defendant committed the offence charged.⁵⁶⁶ As observed by Cory J. in *Nikolovski*:

The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with

⁵⁶⁴ *R. v. Chandra* (1975), 29 C.C.C. (2d) 570 (B.C. C.A.); *R. v. Nicholson* (1984), 12 C.C.C. (3d) 228 (Alta. C.A.), leave to appeal to S.C.C. refused, 12 C.C.C. (3d) 228n; *R. v. Blandizzi* (1998), 37 M.V.R. (3d) 240 (Ont. Ct. (Gen. Div.)).

⁵⁶⁵ *R. v. Chandra* (1975), 29 C.C.C. (2d) 570 at 573 (B.C. C.A.).

⁵⁶⁶ *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.).

instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available.⁵⁶⁷

Similarly, a photograph may be admissible in evidence on the issue of identity if it accurately represents the facts, is not tendered with the intention to mislead and is verified on oath by a person capable to do so.⁵⁶⁸

4.11.11 Judicial Notice

a. Generally

Judicial notice is the acceptance by the court of the truth of a fact or state of affairs without the need for proof.⁵⁶⁹ The exercise of this discretion is an exception to the rule that the trier of fact may only consider evidence that has been tendered before the court.⁵⁷⁰

b. Judicial Notice of Fact

Judicial notice may be taken of a matter or fact which:

- is so generally known and accepted that it cannot be reasonably questioned;
or
- can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.⁵⁷¹

(i) Generally Known and Accepted

With respect to the first alternative, that the matter or fact be generally known and accepted, what constitutes general or common knowledge is to be judged by reference to the common knowledge of the community in which the trial is being held.

⁵⁶⁷ *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 at 412 (S.C.C.).

⁵⁶⁸ *R. v. Creemer*, [1968] 1 C.C.C. 14 (N.S.S.C. A.D.); *R. v. Schaffner* (1988), 44 C.C.C. (3d) 507 (N.S. C.A.).

⁵⁶⁹ *R. v. Potts* (1982), 66 C.C.C. (2d) 219 at 225 (Ont. C.A.); J. Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976.

⁵⁷⁰ *R. v. Potts* (1982), 66 C.C.C. (2d) 219 at 225 (Ont. C.A.).

⁵⁷¹ *R. v. Potts* (1982), 66 C.C.C. (2d) 219 at 225-226 (Ont. C.A.).

The requirement that the fact be common knowledge in the community is satisfied even where the trier of fact is not personally aware of the fact judicially noted. The focus is upon the knowledge possessed by the community at large, not the knowledge of the particular trier of fact. Accordingly, a trial justice is not justified in judicially noting matters or facts that are only within his or her own personal knowledge.

Geographic facts or locations within a community may also be judicially noticed.⁵⁷² Accordingly, where there are references in the evidence to well known streets and locations within a jurisdiction, judicial notice may be taken that the offence took place within the jurisdiction.⁵⁷³

(ii) Readily Determined or Verified

To satisfy the alternative that the fact or matter can be readily determined or verified, the trial justice may consult dictionaries, almanacs, encyclopedias, texts and related authoritative works.⁵⁷⁴

The trial justice may not, however, rely upon professional literature in reaching a conclusion unless the literature has been properly introduced and tested in evidence.⁵⁷⁵ Nor may a trial justice rely upon scientific reports not in evidence to rebut the opinions of experts who have testified at the trial.⁵⁷⁶

(iii) Judicial Notice and Radar Devices

Radar devices, as a means of detecting the speed of a moving object, are properly the subject of judicial notice.⁵⁷⁷ Radar is generally known in the community, and a precise scientific definition can be provided by any dictionary or encyclopedia.

⁵⁷² *R. v. Bednarz* (1961), 130 C.C.C. 398 at 400 (Ont. C.A.).

⁵⁷³ *R. v. Purcell* (1975), 24 C.C.C. (2d) 139 at 140 (N.S. C.A.).

⁵⁷⁴ *Dastous v. Baie-Comeau (Ville)* (1992), 74 C.C.C. (3d) 73 at 81 (Que. C.A.); *R. v. Augustine* (1986), 30 C.C.C. (3d) 542 at 553-554 (N.B. C.A.); D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 91.

⁵⁷⁵ *R. v. Pameli* (1995), 98 C.C.C. (3d) 83 at 94 (Ont. C.A.); *R. v. Desaulniers* (1994), 93 C.C.C. (3d) 371 at 376 (Que. C.A.).

⁵⁷⁶ *R. v. Desaulniers* (1994), 93 C.C.C. (3d) 371 at 377 (Que. C.A.).

⁵⁷⁷ *Dastous v. Baie-Comeau (Ville)* (1992), 74 C.C.C. (3d) 73 at 81 (Que. C.A.).

However, judicial notice can not be taken that the officer using the radar was qualified, or that the specific device used was tested before and after use and found to be accurate, reliable and in good working condition.

c. Judicial Notice of Laws

At common law, the trial justice must take judicial notice of the common law and all statutes. The common law does not, however, require that judicial notice be taken of subordinate legislation.⁵⁷⁸

The *Ontario Evidence Act* and the *Interpretation Act* also govern judicial notice. Sections 25 to 28 of the *Ontario Evidence Act* provide:

25. Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body or of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1980, c. 145, s. 25 (1).

26. Proof in the absence of evidence to the contrary of a proclamation, order, regulation or appointment to office made or issued,

- (a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or
- (b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or
- (c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada,

may be given by the production of:

- (a) a copy of *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment; or

⁵⁷⁸ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 94.

- (b) a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or by the government printer for the province or territory; or
- (c) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the Executive Council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his or her deputy or acting deputy. R.S.O. 1980, c. 145, s. 26; 1993, c. 27, Sched.

27. An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by a member of Executive Council and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1980, c. 145, s. 27.

28. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are proof, in the absence of evidence to the contrary, of the originals and of the contents thereof. R.S.O. 1980, c. 145, s. 28.

Section 7 of the *Interpretation Act* provides:

7. (1) **Judicial notice** — Every Act shall be judicially noticed by judges, justices of the peace and others without being specially pleaded.

(2) **Idem** — Every proclamation shall be judicially noticed by judges, justices of the peace and others without being specially pleaded.

Judicial notice must be taken of statutory instruments, including regulations, published in *The Ontario Gazette* ⁵⁷⁹ and *The Canada Gazette*. ⁵⁸⁰ Proof of publication is not required.

d. Evidential Use of Facts or Matters Judicially Noticed

Once a matter has been judicially noted, it is conclusively proved for the purpose of the proceedings. It is not open to the opposite party to adduce evidence to rebut or disprove

579 *R. v. Bland* (1974), 20 C.C.C. (2d) 332 at 341 (Ont. C.A.).

580 *R. v. Steam Tanker "Evgenia Chandris"* (1976), 27 C.C.C. (2d) 241 at 249 (S.C.C.).

the judicially noted fact.⁵⁸¹

4.11.12 Opinion Evidence

a. Generally

As a general rule, opinion evidence is not admissible. The opinion rule limits a witness to describing precisely and exactly what he or she has observed without expressing any inference or opinion. The rule is based upon the rationale that it is the trier of fact alone who must make inferences and draw conclusions of fact, not the witness.

However, the opinion rule is not absolute. In particular, exception is made for the evidence of expert witnesses, who may express opinions on matters in issue if the criteria for the admission of expert evidence are met. Additionally, lay witnesses may be permitted to give evidence in the form of opinions in proscribed circumstances.

b. Expert Evidence

(i) Generally

The admission of expert evidence is an exception to the exclusionary rule against opinion evidence. An expert may be called for one of two reasons. First, to provide the trier of fact with basic information necessary to understand the scientific or technical issues involved in a case. Second, to state an opinion or conclusion based upon the facts presented. The latter purpose is permissible due to the recognition that, because of the technical nature of the facts in some cases, the trier of fact is unable to form opinions or draw conclusions from the facts on its own.⁵⁸² Simply stated, expert evidence is admissible to furnish the court with information, or to assist the trier of fact in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.⁵⁸³

581 *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 at 150 (Ont. C.A.), leave to appeal ref'd 23 O.A.C. 317n (S.C.C.); *Dastous v. Baie-Comeau (Ville)* (1992), 74 C.C.C. (3d) 73 at 80-81 (Que. C.A.).

582 Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 622-623.

583 *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 at 111 (S.C.C.); *R. v. Burns* (1994), 89 C.C.C. (3d) 193 at 201 (S.C.C.).

(ii) Admissibility of Expert Evidence

In *R. v. Mohan*, the Supreme Court of Canada discussed at length the admissibility of expert evidence. Expert evidence is admissible if the following four criteria are satisfied:⁵⁸⁴

- relevance;
- necessity in assisting the trier of fact;
- absence of any exclusionary rule; and
- a properly qualified expert.

(1) Relevance

Like all evidence, expert evidence must be relevant to a matter in issue before it will be admitted. Evidence is relevant, and *prima facie* admissible, where as a matter of logic it tends to establish the matter or proposition in support of which the evidence is adduced.

However, logical relevance alone is not sufficient to guarantee the admissibility of expert evidence. The opinion must also be legally relevant. It has been recognized that, once admitted, expert evidence may be misused by the trier of fact and may distort the fact-finding process. There is a risk that expert evidence will be accepted uncritically by the trier of fact, and assigned more weight than it deserves, due to the scientific nature of the evidence presented, the often impressive qualifications of the expert witness, and the trier of fact's own unfamiliarity with the subject matter of the expert opinion.

Accordingly, the trial judge retains a general discretion to exclude expert evidence where the benefits of its admission outweigh its costs. Expert evidence may be excluded on this basis where its probative value is outweighed by its prejudicial effect, if its admission involves an amount of court time which is not commensurate with its evidential value, or if it is misleading in the sense that its potential effect on the trier of fact is disproportionate with its reliability.

(2) Necessity in Assisting the Trier of Fact

The function of an expert witness is to provide a "ready-made inference" which the trier of fact, due to the technical nature of the facts, is unable to formulate.⁵⁸⁵ The opinion

⁵⁸⁴ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 411 (S.C.C.).

⁵⁸⁵ *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 at 409 (S.C.C.).

evidence of an expert witness will be necessary where it provides information that is likely to be outside the experience or knowledge of the trier of fact.⁵⁸⁶ This threshold is met where the opinion is necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature, or to help form a correct judgment on a matter if ordinary people are unlikely to do so without the assistance of an expert witness.⁵⁸⁷

It is apparent from the foregoing that if the trier of fact is able to form its own conclusion on the matter without the assistance of expert testimony, the expert testimony is superfluous and unnecessary.⁵⁸⁸

In determining the necessity of expert evidence, as is the case when considering the relevance of expert evidence, the trial justice must also consider the need for the evidence in light of its potential to distort the fact-finding process.⁵⁸⁹

There is an additional concern that admission of expert evidence may unduly encroach upon the fact-finding function of the trial justice. Undue reliance upon the opinion of expert witnesses ought to be avoided. It must be remembered that determination of the facts is solely the responsibility of the trier of fact. The expert witness is there to assist. Moreover, “too liberal” an approach to the admission of expert evidence may result in a trial degenerating into a simple competition between experts.

(3) Absence of an Exclusionary Rule

Opinion evidence that is relevant, necessary, and comes from a properly qualified expert will nonetheless be inadmissible if it contravenes an exclusionary rule of evidence.⁵⁹⁰

There are many examples in the caselaw of expert evidence being inadmissible due to a violation of an exclusionary rule of evidence. In *R. v. Morin*, evidence tendered by the Crown to establish that the accused suffered from an abnormal mental disorder resulting in a propensity to commit the crime charged was inadmissible because it offended the character evidence rule.⁵⁹¹ In *R. v. Marquard*, evidence that the child victim exhibited some symptoms of an abused child, suggesting a history of abuse, was improperly admitted at trial. The Supreme Court of Canada held that since the Crown had alleged

⁵⁸⁶ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 413 (S.C.C.).

⁵⁸⁷ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 413 (S.C.C.); see also *R. v. Lavallee* (1990), 50 C.C.C. (3d) 97 (S.C.C.); *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.).

⁵⁸⁸ See *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.).

⁵⁸⁹ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 413-414 (S.C.C.).

⁵⁹⁰ *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 at 414 (S.C.C.).

⁵⁹¹ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.).

only one incident of abuse, admission of the expert opinion was indirect proof of prior acts of abuse, in contravention of the similar act evidence rule.⁵⁹²

(4) A Properly Qualified Expert

The last precondition for the admissibility of expert testimony is a properly qualified expert. An expert witness must possess special or peculiar knowledge acquired through study or experience in respect of the area in which it is proposed that he or she will testify.⁵⁹³

(a) Qualification of the Expert Witness

The qualifications of an expert are established on a *voir dire*. The party tendering the expert witness must demonstrate, through examination of the witness, that the witness is competent to give expert testimony on the proposed subject(s).⁵⁹⁴ In practice, this involves reviewing the expert's resume and past experience. The opposite party may cross-examine the expert on his or her qualifications to expose deficiencies or limitations. The trial justice then determines whether the proposed witness is qualified to give expert testimony. This determination is a question of law.⁵⁹⁵

Recall that the test for admissibility of expert testimony is whether the expert possesses sufficient skill or knowledge beyond that of the trier of fact. The focus of the inquiry is upon the expert's level of skill or knowledge, not how that skill or knowledge was acquired.⁵⁹⁶ Expertise may be acquired through a variety of means, including education, clinical experience, academic studies and publications, work experience or observation. Once it is established that a witness is competent to give expert testimony, the manner in which the witness gained his or her expertise is a matter of weight, not admissibility.⁵⁹⁷ Accordingly, the fact that a witness does not have any clinical experience or published works in the proposed subject area of expert testimony does not alone render his or her evidence inadmissible.

While the expert gives his or her testimony, it is the responsibility of the opposing party to object if the expert offers opinions in areas beyond his or her established areas of expertise.⁵⁹⁸ An expert witness should not be permitted to offer opinions in areas in which

592 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

593 *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 414 (S.C.C.).

594 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

595 *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.).

596 *Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. C.A.); *R. v. Kinnie* (1989), 52 C.C.C. (3d) 112 (B.C.C.A.).

597 *R. v. Russell* (1994) 95 C.C.C. (3d) 190 (Ont. C.A.).

598 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

he or she has not been formally qualified. However, in the absence of objection, it is not reversible error to permit an expert to offer opinions⁵⁹⁹ on subjects outside his or her qualifications which were established on the *voir dire*, where his or her expertise is nonetheless clear.⁶⁰⁰

(iii) Novel Scientific Evidence

In *R. v. Mohan*, it was held that the admission of expert evidence which advances a novel scientific theory or technique is subjected to “special scrutiny” to determine whether it meets the basic threshold of reliability and necessity.

With respect to the reliability requirement, expert testimony may be excluded where there is a danger that the evidence will:⁶⁰¹

- be misused;
- distract the fact finding process; or
- confuse the trier of fact.

With respect to the necessity requirement, the party tendering the novel scientific evidence must establish that the evidence is *essential*, in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. Moreover, the closer the evidence approaches an opinion on an ultimate issue, the stricter the application of the necessity requirement.

The admission of novel scientific evidence was considered in *R. v. McIntosh*.⁶⁰² In *McIntosh*, the Ontario Court of Appeal considered whether the trial judge erred in not admitting opinion evidence regarding problems of “cross-racial identification,” *i.e.* the perception that members of one race tend to think that members of another race “all look alike.” The proposed expert had conducted extensive research which supported this perception. Citing *Mohan*, Finlayson J.A. writing for the Court held that the tendered opinion evidence was not admissible. The fact that proposed testimony “recites,” or is based upon, the application of a scientific method does not necessarily render the object of study a matter requiring opinion evidence at trial. The opinion evidence in this case

⁵⁹⁹ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 415 (S.C.C.).

⁶⁰⁰ *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

⁶⁰¹ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 324-325; *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 411-412 (S.C.C.); *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.); *R. v. Melarangi* (1992), 73 C.C.C. (3d) 348 (Ont. Ct. (Gen. Div.)), cited with approval in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.).

⁶⁰² *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.).

was not necessary because the subject matter was not outside the normal experience of the trier of fact. There was no need to remind the trier of fact, through expert testimony, of the popular perception. In these circumstances, there is a very real danger that such evidence would distort the fact-finding process.

(iv) Examination of Experts

(1) Generally

In general, there are four forms in which expert evidence can be presented.⁶⁰³

First, the expert may have observed first-hand the facts underlying his or her opinion. For example, an accident-reconstructionist may have observed and measured skid marks on the highway, and from his measurements express an opinion that the defendant was traveling at a particular rate of speed prior to collision. In these circumstances, the expert has first-hand knowledge of the facts underlying his or her opinion, and the expert's testimony regarding the foundation facts may be received in proof of the matters asserted.

Second, the expert may form an opinion prior to trial based upon the results of an investigation. In these cases, the expert's opinion is usually based upon knowledge acquired first-hand or from third parties. The interaction between expert evidence and the hearsay rule is discussed below.

Third, the expert may simply provide the court with scientific knowledge relevant to issues in the case. For example, an expert in child abuse may provide the court with information necessary to assess the credibility of a child abuse victim.

The final form that expert evidence may take is where the expert is simply asked to apply his or her knowledge to the facts of the case, without having conducted any independent investigation. In these cases, the expert will be presented with a hypothetical situation and asked to form an opinion based upon the hypothetical. The use of hypotheticals during the examination of expert witnesses is discussed below.

(2) Expert Evidence and Hearsay

Expert opinion based upon hearsay is not inadmissible on that basis alone. An expert may offer an opinion in his or her area of expertise notwithstanding that the opinion relies upon second hand information. Expert opinion based upon hearsay is admissible if

603 D. Paciocco and L. Streusser, *The Law of Evidence in Canada* (Concord: Irwin, 1996) at 128.

relevant.⁶⁰⁴ The hearsay information is admissible to demonstrate the basis of the opinion, but is inadmissible as proof of the facts upon which the opinion is based.⁶⁰⁵ The hearsay information is received solely for the purpose of assisting the trier of fact to understand the opinion rendered by the expert. The testimony concerning the circumstances upon which the opinion is based is not evidence of its truth.⁶⁰⁶

The weight to be assigned to an expert's opinion is a function of the amount of admissible evidence which forms the basis of the opinion. In *R. v. Abbey*, the Supreme Court of Canada held that "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist." In *R. v. Lavallee*, *Abbey* was interpreted as placing an obligation upon a party tendering an expert witness to ensure that there is *some* admissible evidence before the trier of fact which establishes the factual basis for the expert opinion.⁶⁰⁷ Accordingly, it is not necessary to establish, through admissible evidence, each and every fact relied on by an expert witness before the trier of fact can accept his or her opinion. Where, however, the expert's opinion is based on a mixture of hearsay and admissible evidence, the weight to be attached to the opinion is directly related to the amount and quality of the admissible evidence on which it relies.

It follows that the trier of fact is entitled to attach significant weight to an expert opinion based entirely upon admissible evidence. Conversely, an opinion based entirely upon hearsay evidence is entitled to no weight.

(3) Expert Evidence and Hypothetical Questions

As noted above, experts who have no personal knowledge of the matters in issue in a case may nevertheless be called as witnesses. In these circumstances, the expert witness simply provides the trier of fact with technical or scientific information necessary to understand and draw appropriate inferences from the facts as found.

Different considerations arise where an expert is asked to express an opinion regarding disputed facts. In these circumstances, any questions asked of the expert should be posed in the form of a hypothetical. The examining party should present the expert with a factual scenario which represents the facts the party wants the trier of fact to accept. The

⁶⁰⁴ *R. v. Abbey* (1982), 68 C.C.C. (2d) 38 (S.C.C.).

⁶⁰⁵ *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.).

⁶⁰⁶ *R. v. Abbey* (1982), 68 C.C.C. (2d) 38 (S.C.C.).

⁶⁰⁷ *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 at 130 (S.C.C.).

expert should then be asked to assume the truth of the scenario presented and express an opinion based upon those facts. To the extent that the facts asserted in the hypothetical are proved before the trier of fact, the trier of fact may accept and rely upon the opinion expressed by the expert. Where, however, the facts the expert relied upon in expressing his or her opinion are not proved, no weight should be assigned to the expert's opinion.

(4) Use of Authoritative Texts, Case Studies or Reports

During the examination or cross-examination of an expert witness, both the expert witness and the examining party may refer to authoritative works written on a subject. In *R. v. Marquard*,⁶⁰⁸ L'Heureux Dube J. reviewed the proper procedure to cross-examine an expert witness on authoritative texts, case studies or reports.

First, the witness should be asked whether he or she is familiar with the relevant work and accepts it as authoritative. If the witness is familiar with the work and recognizes it as authoritative, passages from the work can be put to the witness to seek the witness' confirmation. Those passages of the work confirmed by the witness become admissible evidence and may be accepted by the trier of fact as proof of the matter asserted. In effect, the witness adopts the work as his or her evidence.

Where the witness is familiar with the work, recognizes it as authoritative, but does not accept the view or opinion expressed in the work, passages from the work are not admissible in evidence. Absent confirmation by the witness, any passages read to the witness are not admissible for the hearsay purpose of proving any matters asserted in the passages. They are admissible, however, for the limited purpose of testing the expert witness' opinion. Similar to the use of prior inconsistent statements, the contradictory passage may be utilized to assess the value of the expert's opinion or challenge the expert's credibility; to test whether the witness has competently read and applied what has been authoritatively written on the subject.⁶⁰⁹ Moreover, the witness may be asked to explain any differences between his or her opinion and the authoritative work.⁶¹⁰

608 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 at 214-215 (S.C.C.).

609 J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 661.

610 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 at 214 (S.C.C.).

Where the witness is not familiar with the work, or does not recognize it as authoritative, the work has no evidential value. The witness can not be cross-examined on it, nor can the examining party read extracts from the authority into evidence.

(5) Suggested Cross-examination Techniques ⁶¹¹

The following are standard techniques that may be used in the cross-examination of expert witnesses.

- Cross-examination on qualifications. A cross-examination that establishes an expert to be unqualified is rare. However, it may be possible to show that the area upon which the expert is testifying is not the expert's principle area of expertise. As well, if the cross-examiner also has an expert, it may be possible to build up that expert during the cross-examination. The aim is to get the expert being cross-examined to admit that the cross-examiner's expert is as well or better qualified as the expert testifying, and that the views of the cross-examiner's expert are entitled to consideration even if the expert being cross-examined does not agree with them.
- Cross-examination on the factual basis of the opinion. Very often an expert's opinion is based solely on facts that the expert has been asked to assume (and that will be the subject of other evidence), rather than on the basis of actual observations by the expert. Cross-examine to make this clear. The aim of such cross-examination is to get the expert to admit that the opinion is based entirely on the assumptions the expert has been asked to make. Counsel can then challenge the credibility of the witnesses who provide the factual foundation. During the closing, counsel can then argue that even if the expert's opinion is accepted, it is entitled to no weight since there is no factual foundation.
- Cross-examination on alternative explanations of the facts. Counsel may be able to suggest to the expert alternative explanations of the facts upon which the expert is basing the opinion. For example, in an "evidence to the contrary" breathalyzer defence, an expert may offer an opinion that the observed symptoms of impairment are so minimal as to be inconsistent with the breathalyzer reading. Counsel could suggest in cross-examination that the

⁶¹¹ From Orlano, Ministry of the Attorney General, *Handbook for Prosecutors*, 3d ed., by B.W. Long (Toronto: Queen's Printer, 1994) at E13-15 to E13-17.

symptoms are consistent with a practiced drinker who is experienced in “holding his liquor” in social situations. Again, this technique avoids a direct attack on the opinion.

- Cross-examination on additional facts. The expert opinion will be based typically on a hypothetical question that asks the expert to take certain facts into account in coming to an opinion. The cross-examiner may put other facts to the witness that, if established, may affect the opinion. For example, in a careless driving case involving a failure to stop at an intersection, an expert may give evidence that the failure to stop was due to the condition of the road surface, rather than the defendant’s failure to apply the brakes. Counsel in cross-examination may put to the witness other matters such as the ability of vehicles before and after to stop, the fact that the driver behind did not see the brake lights flash on the defendant’s car, the fact that the road surface was checked and nothing was found, and so forth, and suggest that the expert’s opinion is not consistent with these additional facts. If there are a number or such facts, it is best to proceed one point at a time: the expert may be able to explain away some of the facts, but eventually ends up having to concede the point or look partisan.
- Cross-examination to strengthen the cross-examiner’s case. It may be possible to obtain admissions from the expert that strengthens some aspect of the cross-examiner’s case. A typical area where this can be done is where some scientific or technical procedure has been used and the expert is giving an opinion about the results. It is a fair working assumption that if the expert has not criticized the procedures used during examination-in-chief, the procedure is appropriate and has been appropriately performed. For example, a toxicologist in a breathalyzer case who has testified that the defendant’s stated consumption would not have given the readings that the breathalyzer showed, but who has not criticized the instrument or the breathalyzer technician, may be cross-examined to produce an acknowledgement that the breathalyzer is a generally reliable instrument, the set-up and testing was appropriately conducted, and there is nothing to suggest that the instrument was not operating properly. This form of cross-examination should be conducted with care: questions should proceed by small increments to allow for “testing of the water” and a hasty retreat if it seems that some unwanted

answer may be forthcoming.

- Cross-examination on authoritative writing or opinions (that of the expert or of another expert in the field). The limits of this technique should be appreciated. The most that can realistically be hoped for is that the expert will acknowledge that there are other legitimate opinions or views that contradict the opinion the expert has given. Where one cross-examines an expert on the expert's own prior writings expressing a different opinion, most experts will have an explanation for the shift. One can then get the expert to acknowledge that views may change over time, and it is possible that the expert may change his or her opinion further in the light of research or discoveries yet to come.
- Cross-examination to impeach the witness, rather than the evidence. This is not often possible. Tactics such as pointing out that the witness is being paid to come to court are cheap, and are likely to backfire (counsel are usually being paid to come to court). However, an expert can sometimes be shown through cross-examination to be overly egotistical, overly dogmatic, overly biased, overly hostile to the other party (or the other party's expert: academic rivalry can be bitter), or too quick to offer opinions in areas outside the expert's field of expertise. This can legitimately affect the weight to be given to the expert's opinion, even if the opinion itself is not directly challenged. It is rarely possible to plan such a cross-examination unless counsel is familiar with the expert, but counsel should be alert for signs of such traits in cross-examination so that they can be followed up if they present themselves.

(v) *Limits on the Number of Experts - The Ontario Evidence Act*

Section 12 of the *Ontario Evidence Act* provides:

12. Where it is intended by a party to examine as witnesses persons entitled according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

Pursuant to s. 12 *Ontario Evidence Act* (OEA), the maximum number of expert witnesses that a party may call as of right is three. Leave of the trial justice is required to call more than three expert witnesses. The rationale underlying s. 12 *Ontario Evidence Act* (OEA) is to prevent trials from degenerating into a contest between experts.

(vi) The Ultimate Issue Rule**(1) Generally**

The ultimate issue rule, stated simply, is a witness may not give an opinion regarding the very issue to be determined by the court.⁶¹² The rationale underlying the rule is the concern that permitting a witness to express an opinion regarding the issue that the trier of fact must decide would unduly encroach upon the function of the trier of fact. There is a danger that the trier of fact may “blindly” and uncritically accept the opinion offered by a witness.

It has been recognized that strict application of the ultimate issue rule is impractical and impossible. Moreover, the fears underlying the ultimate issue rule are exaggerated. As observed by Dickson J. in *R. v. Graat*, a witness who offers an opinion can not usurp the function of the trier of fact because the trier of fact is free to accept all, part or none of a witness’ testimony. However, the closer that evidence approaches an opinion on an ultimate issue, the stricter the application of the rule.⁶¹³

(2) Expert Evidence and Credibility

The determination of whether a witness is credible or truthful is to be made by the trier of fact.⁶¹⁴ The issue of credibility falls within the experience and knowledge of the trier of fact. The lay person is considered capable of assessing the credibility and reliability of evidence based on logic, experience and common sense without the assistance of an expert.⁶¹⁵ Evidence adduced solely for the purpose of proving a witness is truthful violates the rule against oath-helping, and is inadmissible.⁶¹⁶ Accordingly, expert evidence adduced solely to bolster the credibility of a witness is inadmissible.

The rule against oath-helping does not, however, absolutely preclude evidence relevant to the assessment of credibility. Expert evidence on human conduct, and psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible, if such evidence goes beyond the knowledge and experience of the trier of fact.⁶¹⁷

612 *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.).

613 *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.).

614 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

615 *R. v. Beland* (1987), 36 C.C.C. (3d) 481 (S.C.C.).

616 *R. v. Burns* (1994), 89 C.C.C. (3d) 193 at 202. (S.C.C.)

617 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

The rationale underlying the admissibility of this evidence is certain aspects of human behaviour important to the assessment of credibility may not be understood by the lay person, necessitating explanation by the expert.⁶¹⁸ In general, expert opinion evidence will be permitted where a witness suffers from some physical or psychological defect or condition which affects the witness' credibility.⁶¹⁹ For example, expert evidence is admissible to show that certain physical and psychological conditions are consistent with sexual abuse.⁶²⁰ An expert is not permitted to testify, however, that, based upon the presence or absence of certain symptoms, he or she believes the witness is telling the truth.⁶²¹

(3) Domestic Law

No witness can provide opinion evidence on a pure question of domestic law.⁶²² Determinations of law are to be made by the trial justice.

So, for example, if the ultimate issue rule is applied to a prosecution for careless driving, a witness should not be permitted to testify that the defendant was driving carelessly. Whether the defendant's driving amounted to careless driving is a question of law to be determined by the trial justice on the basis of the facts as he or she finds them. Accordingly, the witness should be limited to relating his or her observations of the defendant's driving at the relevant time.

c. Opinion Evidence of Lay Witnesses

(i) Generally

Admission of the evidence of lay witnesses in the form of opinion is another exception to the opinion rule. Recall that the opinion rule precludes a witness from giving testimony in the form of an opinion. A witness should only relate facts that he or she observed. However, due to the recognition that the distinction between fact and opinion or inference is not so clear,⁶²³ the evidence of a lay witness in the form of an opinion may be admitted.

618 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

619 *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), affirmed 47 C.C.C. (2d) 411 (S.C.C.); *R. v. Beland* (1987), 36 C.C.C. (3d) 481 (S.C.C.); *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

620 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.); *R. v. R.(D.)* (1996), 107 C.C.C. (3d) 289 (S.C.C.); *R. v. J.(F.E.)* (1990), 53 C.C.C. (3d) 64 (Ont. C.A.).

621 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 (S.C.C.).

622 *R. v. Century 21 Ramos Realty Inc.* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.); *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.).

623 *R. v. Graat* (1982), 2 C.C.C. (3d) 365 at 378 (S.C.C.).

Opinion evidence of a lay witness may be admitted where the witness is “merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly”. In general, lay opinion will not be excluded if the witness can more accurately express the facts he or she perceived in the form of an opinion, rather than by stating them as primary facts.⁶²⁴

In exercising the discretion to admit lay opinion testimony, the primary factor to be considered by the trial justice is whether the witness, due to the opportunity for personal observation, was in a better position than the court to form an opinion regarding the issue to be determined.⁶²⁵ If permitting the witness to give testimony in the form of an opinion will be helpful to the court, it may be permitted. The factors which the court will consider in determining whether to permit the reception of lay opinion have been summarized as follows:⁶²⁶

- whether the witness has personal knowledge;
- whether the witness is in a better position than the trier of fact to form the opinion;
- whether the witness has the necessary experiential capacity to make the conclusion; and
- whether the opinion is a compendious mode of speaking and the witness could not as accurately and adequately and with reasonable facility describe the facts she or he is testifying about.

(ii) Examples of Subjects Upon Which Lay Witnesses May Give Opinion Evidence

In *R. v. Graat*, the following non-exhaustive list of subjects upon which lay witnesses may give opinion evidence was provided:⁶²⁷

- identification of persons, handwriting and things;
- apparent age;
- the bodily plight or condition of a person, including death and illness;

⁶²⁴ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998) at 329.

⁶²⁵ *R. v. Graat* (1982), 2 C.C.C. (3d) 365 at 378-379 (S.C.C.).

⁶²⁶ D. Paciocco and L. Streusser, *The Law of Evidence in Canada* (Concord: Irwin, 1996) at 115; J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 609.

⁶²⁷ *R. v. Graat* (1982), 2 C.C.C. (3d) 365 at 378 (S.C.C.).

- the emotional state of a person;
- the condition of things (e.g. worn, shabby, used or new);
- certain questions of value; and
- estimates of speed and distance.

4.11.13 Privilege

Privilege is an exclusionary rule which recognizes the social interest in preserving and encouraging certain relationships that exist in the community which are based on confidential communications.⁶²⁸ Where a claim for privilege is established it will lead to the exclusion of relevant evidence.

In some cases, privilege will apply on a “class” of communications. If the communication is of that class, there is a presumption that the communication is privileged and inadmissible.⁶²⁹ The most recognized “class” of communications are those between a solicitor and client and those between spouses. While communications between a solicitor and client are recognized by common law, spousal communications are specifically protected by statute in section 4(3) of the *Canada Evidence Act* and s. 11 of the *Ontario Evidence Act*. Section 4(3) of the *Canada Evidence Act* provides that:

No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Section 11 of the *Ontario Evidence Act* also states:

A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage.

While there has been a reluctance on the part of the judiciary to broaden the scope of class privileges, there are circumstances where privilege may be recognized on “case by case” basis.

Where a claim of privilege is asserted to protect a communication which falls outside of the established class privileges, the court will apply the four-fold Wigmore Test to

⁶²⁸ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 713.

⁶²⁹ D. Paciocco & L. Stuesser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 134.

determine whether privilege should be extended.⁶³⁰

The following are the four factors which must be met:

- The communications must originate in a confidence that they will not be disclosed.
- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
- The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The forum to determine a claim for privilege is a *voir dire*. The person seeking to exclude the evidence on the basis of privilege will bear the burden of demonstrating that there are compelling policy reasons which require the exclusion of the evidence.

4.12 Examination of Witnesses

4.12.1 Competence and Compellability

a. Competence

(i) Generally

As a trial proceeds, witnesses will be called upon to give evidence. For the evidence of a witness to be received by the court, it must be demonstrated that the witness is competent. Competency means that the person is qualified or capable of giving evidence.⁶³¹ Historically the common law required that in order to be competent the witness had to express a belief in a supreme being so that they might take an oath to tell the truth.⁶³² Today, a witness who objects to swearing an oath, affirms or makes a

530 See *Slavutych v. Baker*, [1976] 1 S.C.R. at 254 and Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) (2nd Ed) at 716 ff for a discussion on the application of the Wigmore Test.

631 Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 671. See also D. Paciocco & L. Stuesser, *The Law of Evidence in Canada* (Toronto: Irwin Law, 1996) at 203.

632 Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) (2nd Ed) at 680.

declaration which has the same force as an oath. As a general rule, every person is competent to testify in any case. There are instances, however, where individuals who possess relevant knowledge, may be precluded from testifying.

(ii) Mental Incompetence

A person who is mentally incompetent will be competent to testify if the delusion does not affect perception, memory or articulation of the events in question. If the mental deficiency appears during the course of the witness' examination it will impact credibility and not competency. The judge also has the discretion to stop the giving of evidence and order that the evidence be ignored or declare a mistrial.

(iii) Children

Witnesses over the age of fourteen are presumed competent. Where a child under the age of fourteen possesses relevant knowledge, the court shall conduct an inquiry, with counsel being invited to ask supplemental questions, to determine whether the witness has the capacity to observe, recollect and communicate the evidence and whether the witness accepts and is aware of the responsibility of testifying in a truthful manner.⁶³³ The court may admit the child's evidence even though the child does not understand the meaning of an oath or solemn affirmation, if the child can communicate the evidence and promises to tell the truth and understands what it means to tell the truth. In a situation where the child understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth, the court may exercise further discretion in accepting the child's evidence, if the court is satisfied the child's evidence is sufficiently reliable.⁶³⁴

b. Compellability

Once it is established that a witness is competent but does not want to testify, the witness can be compelled to do so. A subpoena may be issued to force a compellable witness to attend court to give evidence.⁶³⁵ Section 39 of the *POA* creates the authority to compel attendance at trial. Section 39 provides:

Where a justice is satisfied that a person is able to give material evidence in a proceeding under this Act, the justice may issue a summons requiring the person to attend to give evidence and bring with him or her any writings or things referred

⁶³³ D. Paciocco and L. Steusser, *The Law of Evidence* (Toronto: Irwin Law, 1996) at 204.

⁶³⁴ *Ontario Evidence Act*, ss 18.1 (1), (2), (3).

⁶³⁵ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 692.

to in the summons.

Although a witness is compelled to testify, the witness may invoke a privilege in certain circumstances, for example solicitor-client or spousal privilege, and refuse to disclose any information sought by counsel.

Section 46(5) of the *Provincial Offences Act* expressly provides that notwithstanding s. 8 of the *Ontario Evidence Act*, the defendant is not a compellable witness for the prosecution with respect to communications with his or her spouse. Section 8 of the *Ontario Evidence Act* provides that:

8. (1) Evidence of Parties – The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties and the husbands and wives of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.

Section 11(c) of the *Charter* renders it unconstitutional to compel an accused to testify at his or her own trial. Section 11 states in part that:

11. Any person charged with an offence has the right

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence

However, this does not apply to corporations. The Supreme Court of Canada held that the officer of an accused corporation is a compellable witness.⁶³⁶

An accused being tried jointly with a co-accused is not a compellable witness for the prosecution to testify against the co-accused on the basis of common law, statutory and *Charter*.⁶³⁷

4.12.2 Prosecutorial Discretion to Call Witnesses

a. Generally

The prosecutor has the legal burden of proving the defendant's guilt beyond a reasonable doubt. To do so, the prosecutor must call sufficient evidence to prove all of the elements

⁶³⁶ *R. v. Amway Corp.*, [1989] 1 S.C.R. 21.

⁶³⁷ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 693.

of the offence charged. While preparing for trial, the prosecutor must determine which witnesses will be needed to testify to the circumstances of the offence in order to meet this burden. Whether or not a witness will be called by the prosecutor is solely within the discretion of the prosecutor.⁶³⁸

The exercise of discretion by the prosecutor is essential to the smooth functioning of the administration of justice.⁶³⁹ To impose a mandatory duty upon the prosecutor to call all witnesses who may provide information relevant to the circumstances of the offence, regardless of the witness' credibility, reliability, desire to testify, or ultimate impact on the outcome of the trial, would unduly restrict the discretion of the prosecutor regarding the conduct of the prosecution case.⁶⁴⁰ The prosecutor need only call those witnesses who are essential to meeting the burden of proving the offence against the defendant.⁶⁴¹

In *R. v. Cook* it was noted that, historically, fairness has been the main ground argued in favour of a duty to call all relevant witnesses.⁶⁴² In particular, it was argued that not requiring the prosecutor to call all material witnesses permits a "trial by ambush," and prejudices a defendant by forcing the defendant to call a witness who should have been called by the prosecutor. With respect to the "trial by ambush" argument, the court in *Cook* observed that any risk that the defendant will be "ambushed" is met by the availability of full disclosure.

Moreover, the defendant is not prejudiced by having to call a witness who is beneficial to his or her own case. To require the prosecutor to call a witness who does not support the prosecution case would disrupt the adversarial trial process. If the witness the defendant calls does not want to assist the defendant, the defendant may have the witness declared adverse or hostile. Additionally, where it would be manifestly unfair for the defendant to be required to call the witness, the trial justice may decide to call the witness him or herself.

b. Section 5.2 POA

Section 5.2 of the POA should be considered in light of the foregoing principles. Section

⁶³⁸ *Lemay v. The King* (1951), 102 C.C.C. 1 at 7 (S.C.C.); *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.).

⁶³⁹ *R. v. Beare* (1988), 45 C.C.C. (3d) 57 at 76 (S.C.C.); *R. v. T.(V.)* (1992), 71 C.C.C. (3d) 32 at 38-41 (S.C.C.); *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 488-490 (S.C.C.). See also Section 4.2.2, *infra* "The Prosecutor".

⁶⁴⁰ *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 488-491 (S.C.C.).

⁶⁴¹ *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 at 433-434 (S.C.C.). See also *R. v. Panchal* (1995), 17 M.V.R. (3d) 60 (Ont. Ct. (Prov. Div.)), where the learned justice of the peace erred in dismissing the charge against the defendant due to the absence of the provincial offences officer.

⁶⁴² *R. v. Cook* (1997), 114 C.C.C. (3d) 481 at 493 (S.C.C.).

5.2 provides:

5.2 (1) Challenge to officer's evidence – A defendant who gives notice of an intention to appear in court for the purpose of entering a plea and having a trial of the matter shall indicate on the notice of intention to appear or offence notice if the defendant intends to challenge the evidence of the provincial offences officer.

(2) Notifying officer – If the defendant indicates an intention to challenge the officer's evidence, the clerk of the court shall notify the officer.

Section 5.2 provides that where a defendant indicates on her notice of intention to appear that he or she wishes to challenge the evidence of the provincial offences officer, the officer will be notified of the defendant's intention for the purpose of attending the trial.

However, section 5.2 does not impose a mandatory duty upon a prosecutor to call the provincial offences officer where the defendant has indicated an intention to challenge the evidence of the provincial offences officer.⁶⁴³ Rather, if the officer does not attend the hearing despite having been notified of the defendant's intention, the court should conduct an inquiry into the value of the officer to the defendant, either as a witness or for the purpose of disclosure. If there is no ascertainable value to the defendant in having the officer in person in the building, that would end the matter. If there is prejudice in any amount arising out of the non-attendance of the officer, then a range of remedies might be considered.

Depending upon the level of prejudice occasioned to the defendant due to the absence of the provincial offences officer, the appropriate remedy may include an adjournment⁶⁴⁴ or a stay.⁶⁴⁵

⁶⁴³ *R. v. Panchal* (1995), 17 M.V.R. (3d) 60 at 63 (Ont. Ct. (Prov. Div.)).

⁶⁴⁴ *R. v. Chatterton* (10 February 1995), (Ont. Ct. (Prov. Div.)) [unreported].

⁶⁴⁵ *R. v. Panchal* (1995), 17 M.V.R. (3d) 60 at 64 (Ont. Ct. (Prov. Div.)).

4.12.3 Interpreters

a. Generally

The court may provide an interpreter for a witness who finds it difficult to or simply cannot understand or speak English.⁶⁴⁶ Providing an interpreter where necessary ensures that a witness is able to give his or her evidence fully, accurately and effectively, as if the witness spoke the language of the proceedings.⁶⁴⁷

Section 84 *POA* authorizes the use of interpreters in *POA* proceedings. Section 84 *POA* provides:

84. (1) Interpreters – A justice may authorize a person to act as interpreter in a proceeding before the justice where the person swears the prescribed oath and, in the opinion of the justice, is competent.

(2) Idem – A judge may authorize a person to act as interpreter in proceedings under this Act where the person swears the prescribed oath and, in the opinion of the judge is competent and likely to be readily available.

b. The Right to an Interpreter

A party or witness in a proceeding has the right to an interpreter. The right to an interpreter is guaranteed by section 14 of the *Charter*. Section 14 of the *Charter* provides:

14. Interpreter - A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

The defendant's constitutional right to an interpreter in criminal or quasi-criminal proceedings was comprehensively discussed in the Supreme Court of Canada's decision in *R. v. Tran*. The right to an interpreter is closely related to the right to a fair trial enshrined in section 11(d) of the *Charter*, and is also a principle of fundamental justice within the meaning of section 7.⁶⁴⁸ Basic fairness requires that the defendant knows in full detail, and contemporaneously, what is taking place in proceedings that will decide his or her fate. Knowledge of the case to be met, in turn, helps to ensure that the defendant is given a full opportunity to make full answer and defence.

⁶⁴⁶ *R. v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.). Note that, pursuant to section 126(1) CJA, a defendant who speaks French has the right to have his or her trial conducted as a bilingual proceeding. If a bilingual proceeding is requested, pursuant to subsections 126(2) and (2.1) CJA, both the trial justice and the prosecutor must be bilingual.

⁶⁴⁷ D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell 1998) at 134

⁶⁴⁸ *R. v. Tran* (1994), 92 C.C.C. (3d) 218 at 239 (S.C.C.).

In addition, the right to an interpreter reflects the right to equality, aboriginal rights, and the multicultural nature of Canadian society, all of which are constitutionally protected in the *Charter*.

(i) Establishing the Need for an Interpreter

The level of understanding guaranteed by section 14 is high. Accordingly, establishing the need for an interpreter is not difficult. In general, the court should appoint an interpreter where:

- it becomes apparent that the defendant is, for language reasons, "having difficulty expressing him or herself or understanding the proceedings and that the assistance of an interpreter would be helpful"; or
- the defendant, or his or her agent or counsel, requests the services of an interpreter, and the justice considers the request to be justified.

The overriding concern is ensuring that the defendant or witness understands the proceedings.

Note that the court does not have to wait until a witness makes a request before an interpreter may be provided. The court, pursuant to section 84 of the *POA*, may appoint an interpreter where it is clear that the witness is having difficulty understanding or speaking the language of the proceedings.⁶⁴⁹

(ii) Standard of Interpretation

The constitutionally mandated standard of interpretation, as defined by Lamer C.J.C. in *Tran*, is one of "continuity, precision, impartiality, competency and contemporaneousness."⁶⁵⁰

Interpretation should be continuous. Breaks and interruptions in interpretation should not be allowed. Similarly, interpretation should be precise. The interpreter should try to interpret the proceedings word for word as closely as possible.

649 See *R. v. Tran* (1994), 92 C.C.C. (3d) 218 at 242-244 (S.C.C.) for guidance with respect to when the court, of its own initiative, should appoint an interpreter. An interpreter should be appointed where it is necessary to ensure the fairness of the proceedings in accordance with the principles of natural justice.

650 *R. v. Tran* (1994), 92 C.C.C. (3d) 218 at 250 (S.C.C.).

The interpreter should not "clean up" grammar and syntax, add commentary, or only provide a summary of the question or evidence.

In addition to impartial and competent, interpretation should be contemporaneous. To meet the requirement of contemporaneity, interpretation should be consecutive, *i.e.* after the words are spoken. In this way, the defendant is kept informed of the proceedings and able to participate when necessary.

4.12.4 Exclusion of and Contact with Witnesses

a. Exclusion of Witnesses

At common law, the trial justice has a discretion to exclude any witness from the courtroom until he or she is required to give evidence. The rationale underlying the power to exclude witnesses is the need to preserve the witness' testimony in its original state.⁶⁵¹ There is a danger that a witness who has heard the evidence of a prior witness may tailor his evidence to conform or rebut the evidence of that prior witness.

In criminal or quasi-criminal proceedings, an order excluding witnesses is usually granted upon request.

b. Contact with Witnesses

(i) Generally

No party to the proceedings has a proprietary interest in a witness. Accordingly, either the prosecutor or the defendant may interview any proposed witness, or discuss with a witness the evidence he or she intends to give.

The ability to discuss a witness' evidence is not without limits. The following guidelines should be adhered to with respect to contact with witnesses giving evidence during a trial.

*(ii) By Party Calling the Witness*⁶⁵²

During examination-in-chief, it is not improper for the examining party to discuss with the witness any matter that has not been covered in the examination up to that point.

Between completion of examination-in-chief and commencement of cross-examination of

⁶⁵¹ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 902.

⁶⁵² The Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.04 Commentary.

the party's own witness there should be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination-in-chief.

During cross-examination by the opposite party, while the witness is under cross-examination the party that called the witness should not have any conversation with the witness respecting the witness' evidence or relative to any issue in the proceeding.

Between completion of cross-examination and re-examination: the re-examining party should not discuss any evidence that will be discussed during re-examination.

(iii) By Party Opposed in Interest

During examination-in-chief of a witness that is called by the opposite party, the party not conducting the examination-in-chief may discuss the evidence with the witness, unless the witness is sympathetic to the opposite party's interest.

During cross-examination of a witness that was called by the opposite party, it is proper to discuss the witness' evidence with the witness, unless the witness is sympathetic to the cross-examining party's cause. In the latter scenario, discussions with the witness about the evidence should be restricted in the same manner as communications during examination-in-chief of the party's own witness (*i.e.* only discuss any evidence that has not been covered up to that point in the examination).

During re-examination of a witness called by the opposing party, similar considerations apply. If the witness is adverse in interest, then it is proper to discuss the witness' evidence to be given on re-examination. If however, the witness is sympathetic to your position, there should not be any communication with the witness about the witness' testimony to be given on re-examination.

4.12.5 Examination in Chief

a. Generally

After the defendant has been arraigned and enters a plea, the trial justice will call upon the prosecution to present its case. The case against the defendant is presented to the court primarily through the oral testimony of prosecution witnesses.⁶⁵³

⁶⁵³ A party may also adduce real and demonstrative evidence.

The process of calling one's own witness and questioning him or her in front of the trier of fact is called examination-in-chief.

Examination-in-chief serves four purposes:⁶⁵⁴

- build or support the calling party's case;
- weaken the opponent's case;
- strengthen the credibility of the witness; and
- strengthen or weaken the credibility of other witnesses.

Generally, the examination of a witness is governed by the issues in the case and the applicable substantive law and rules of evidence.

b. Form of Questioning: Open-Ended v. Leading Questions

Generally, a party examining its own witness may only ask open-ended questions. Open-ended questions permit witnesses to tell their story in their own words. Questions such as, "What happened next?", "What did you see?", and, "What colour was the light?" are good examples.

Further understanding of the nature of open-ended questions can be gained by contrasting open-ended questions with their functional opposite, leading questions. Leading questions suggest the answer to a witness. For example, "Was the light red when the defendant's vehicle entered the intersection?" is a leading question.

In general, leading questions are not permitted during examination-in-chief.⁶⁵⁵ Parties are restricted to asking open-ended questions during examination-in-chief out of a concern to ensure that the court is presented with independent and uninfluenced evidence from witnesses, rather than re-phrased submissions of counsel. Accordingly, answers to leading questions asked during examination-in-chief may not be regarded as credible and reliable as testimony adduced through open-ended questions, and less weight may be assigned to such answers.

⁶⁵⁴ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 909.

⁶⁵⁵ E.J. Levy, *Examination of Witnesses in Criminal Cases*, 3d ed. (Toronto: Carswell 1994) at 20.

However, leading questions may be asked during examination-in-chief where it is necessary in the interests of justice to do so.⁶⁵⁶ For example, it is not improper to ask leading questions regarding introductory, uncontroversial or undisputed matters, such as the witness' name, address, occupation or qualifications.⁶⁵⁷ Leading questions with respect to these and other matters not directly relevant to facts or issues in dispute assist the orderly presentation of evidence, reducing the time and costs of trial proceedings.⁶⁵⁸

Further, leading questions may be asked during examination-in-chief in the following circumstances:

- where the witness, due to age, language, or mental challenge, is having difficulty answering a question;⁶⁵⁹
- where the witness is having difficulty recalling evidence;⁶⁶⁰
- where the witness is having difficulty understanding the subject matter of a question;
- to bring the witness' attention to persons or things, *e.g.* "Do you see the driver of the motor vehicle in court today?";
- to contradict the statement or testimony of another witness, *e.g.* "Mr. Smith testified that the light was red when your vehicle entered the intersection. Is that correct?"; or
- where leave has been obtained to cross-examine the witness as adverse or hostile.

In summary, a party calling a witness should not ask leading questions related to material issues likely to be contested by the opposite party.

c. Refreshing Memory

(i) Generally

There are a number of reasons why a witness may have difficulty remembering the circumstances he or she has been called to testify to. There is the delay between the

656 *R. v. Coffin* [1956], 23 S.C.R. 1 at 18 (S.C.C.).

657 *Maves v. Grand Trunk Pacific Ry. Co.* (1913), 6 Alta. L.R. 396 at 406 (Alta. C.A.).

658 R.E. Salhany, *Criminal Trial Handbook* (1998-Rel.4) (Toronto: Carswell 1992) at 11-3.

659 *R. v. Caron* (1994), 94 C.C.C. (3d) 466 (Ont. C.A.).

660 *Maves v. Grand Trunk Pacific Ry. Co.* (1913), 6 Alta. L.R. 396 at 408 (Alta. C.A.).

offence date and trial. Some find testifying an unnerving experience. Others, like police officers, due to the routine nature of most offences proceeded with by way of certificate of offence, may have no independent recollection of the offence or the defendant.

Prior to trial, there are no restrictions on what may be used by a witness to refresh his or her memory. The nature of the material used to refresh memory may, however, affect the weight assigned to the witness' testimony.⁶⁶¹

(ii) Refreshing Memory at Trial

Where the witness has difficulty recollecting an event while in the witness box, the witness can refresh his or her memory by reviewing a document if either of the following prerequisites are satisfied:

- the record or document was made by the witness at or near the time of the occurrence of the event or matter recorded, *i.e.* while the witness' memory was still fresh; or
- if the record or document was made by a person other than the witness, the record or document records events observed by the witness, and was reviewed by the witness at the time it was made and confirmed as accurate.⁶⁶²

Before a witness will be permitted to refer to the record or document, (typically notes made by a police officer), the document must be "qualified." Qualifying notes is the process through which the Court is apprised of the circumstances surrounding the making of the notes, to permit the Court to make a judicial determination whether the notes may be used to refresh the witness' memory. In practice, officer's notes are qualified by asking the officer the following questions:

- Did you make notes regarding this offence/investigation?
- Do you need them to refresh your memory?
- When were the notes made?
- Were the events recorded fresh in your mind at the time you made the notes?
- Have you made any additions, deletions, alterations or corrections to your notes?

⁶⁶¹ *R. v. B.(K.G.)* (1998), 125 C.C.C. (3d) 61 at 66-67 (Ont. C.A.).

⁶⁶² *Fleming v. Toronto Ry. Co.* (1911), 25 O.L.R. 317 (C.A.).

(iii) Past Recollection Recorded v. Present Recollection Revived

The process of a witness referring to his notes to assist recollection is generically referred to as “refreshing memory.” However, there are two distinct situations where reference to notes made of an event may be necessary during testimony: where the witness has no independent recollection of the past events; and where the witness simply needs to have his memory prodded. The former situation is referred to as “past recollection recorded,” while the latter situation is referred to as “present recollection revived.”

In cases of present recollection revived, the witness relies upon the notes or document to spark his memory of the events testified to. In fact, anything capable of jogging the witness’ memory may be used.⁶⁶³ The evidence in this situation is the witness’ oral testimony regarding the past event, recollection of which has been revived by reference to the notes. The notes are only a trigger, and are not evidence.

Where the notes are being used to revive the witness’ memory, the witness should be asked to read the notes to himself. The witness should then be asked the question, and any answer given should be made without reference to the notes. If the witness needs to refer to the notes in order to answer, it is better to categorize the situation as past recollection recorded.

In cases of past recollection recorded, it is the notes themselves that constitute the evidence, because the witness has no independent recollection of the events recorded. The witness is present simply to verify that he recalls making the notes, and that they were accurate when he made them. The witness’ testimony, in essence, consists of the witness reading from his notes. Accordingly, the notes themselves may be entered as an exhibit.

Where the witness has no independent recollection of the events recorded in his notes, the requirements that the notes were made at or near the time of the events recorded, and the events were still fresh in the witness’ mind should be strictly enforced by the Court. Where the witness’ testimony is based entirely upon his notes, strict enforcement of these pre-requisites are the only means of ensuring the accuracy of the witness’ testimony.⁶⁶⁴

(iv) Cross-Examination on Document Used to Refresh Memory

A witness may be cross-examined on a document used to refresh his or her memory.

⁶⁶³ *R. v. B.(K.G.)* (1998), 125 C.C.C. (3d) 61 at 66-67 (Ont. C.A.).

⁶⁶⁴ Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 926.

The party cross-examining the witness is entitled to a copy of the document.⁶⁶⁵

(d) Adverse Witnesses

(i) Generally

At common law, where in the opinion of the trial justice a witness is hostile to the party calling him or her, the party may impeach that witness through cross-examination or independent evidence.⁶⁶⁶ The right to cross-examine a witness declared to be hostile included the right to cross-examine with respect to prior inconsistent statements. The common law did not, however, address the situation where the witness denied making the prior inconsistent statement. In Ontario, s. 23 OEA addresses this issue, and allows for proof of prior inconsistent statements of a witness.

(ii) Section 23 Ontario Evidence Act

Section 23 OEA provides:

23. A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement.

Proof that the witness called by the party is adverse is key to the application of s. 23. In *Wawanessa Mutual Insurance Co. v. Hanes*, the Ontario Court of Appeal held that “adverse” is not limited to “hostility.” Rather, “adverse” means “opposed in interest” or “unfavorable in the sense of opposite in position.”⁶⁶⁷

Adversity should be established on a *voir dire*. The examining party bears the onus of satisfying the justice that a prior inconsistent statement was made, and that the witness is adverse.

⁶⁶⁵ *R. v. Mugford* (1990), 58 CCC (3d) 172 (Nfld. C.A.)

⁶⁶⁶ *Wawanessa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.); *R. v. Cassibo* (1982), 70 C.C.C. (3d) 498 (Ont. C.A.).

⁶⁶⁷ *Wawanessa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 at 187 (Ont. C.A.).

The burden of proof is on a balance of probabilities.⁶⁶⁸ In making the determination of adversity, the trial justice should consider all relevant circumstances, including the allegedly prior inconsistent statement.⁶⁶⁹

Note that, pursuant to s. 23 OEA, before an alleged prior inconsistent statement is proved against the witness, the examining party shall put to the witness the circumstances surrounding the making of the statement, and ask the witness whether or not he or she made the statement. If the witness admits making the statement, no *voir dire* is required.

(iii) Scope of Cross-examination Under Section 23

Once the witness has been proved adverse, he or she may be cross-examined on his or her prior inconsistent statement, oral or written.⁶⁷⁰ However, the declaration of adversity does not entitle the party calling the witness to cross-examine the witness at large.⁶⁷¹

(iv) Evidential Value of Prior Inconsistent Statement

Prior inconsistent statements of an adverse witness under s. 23 OEA may only be used to impeach the credibility of the witness. Unless the witness adopts his or her prior inconsistent statement as true, the statement can not be used for substantive purposes.

However, pursuant to the Supreme Court of Canada's decision in *R. v. B.(K.G.)*,⁶⁷² prior inconsistent statements of a witness may be admitted for the truth of their contents as an exception to the hearsay rule.

4.12.6 Cross-Examination

a. Generally

Following examination-in-chief of a witness, the opposite party may choose to cross-examine that witness. Cross-examination plays a pivotal role in our adversarial system of justice. It is the primary means of challenging the case of the opposing party.

668 *R. v. Williams* (1985), 18 C.C.C. (3d) 356 at 370 (Ont. C.A.); *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

669 *Wawanesa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.); *R. v. Cassibo* (1982), 70 C.C.C. (3d) 498 (Ont. C.A.).

670 *Wawanesa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.).

671 *Wawanesa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.); *R. v. Cassibo* (1982), 70 C.C.C. (3d) 498 (Ont. C.A.).

672 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

Cross-examination serves two purposes. The first purpose is to discredit the witness' testimony in chief by demonstrating that the witness is mistaken or lying. The second purpose is to adduce favourable evidence through the witness, by either adducing evidence that directly supports your case, or qualifying the witness' testimony in-chief.

A party generally has wide latitude regarding what questions may be asked during cross-examination. Any question which is relevant to the substantive issues in the case or the witness' credibility may be allowed.⁶⁷³

It is important to remember that during cross-examination, the questions asked or suggestions made to a witness are not evidence. Only the witness' answers are evidence in the case.

b. Form and Limits of Questioning⁶⁷⁴

(i) Leading Questions

Unlike the situation during examination-in-chief, a party cross-examining a witness may ask leading questions. A leading question is one that suggests the answer to the witness, such as, "Did you see the defendant's vehicle in your rearview mirror?" Generally, leading questions invite only a "yes" or "no" answer.

Not only is it permissible to ask leading questions during cross-examination, it is advisable to do so as a means of controlling the testimony of a witness who most likely is not sympathetic to your position. By restricting potential responses to "yes" or "no," or short answers, the witness is given a reduced opportunity to frame answers in a way that harms the case you are trying to make out.

(ii) Relevance

During cross-examination, a witness may be asked any question that is material or relevant to a fact in issue, or that tends to impeach the credibility of the witness.⁶⁷⁵ If the witness is asked a question that is not relevant to an issue at trial, the court has a duty to disallow the question, even in the absence of an objection from the opposing party.⁶⁷⁶

⁶⁷³ *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 391 (S.C.C.).

⁶⁷⁴ See also Section 4.2.4, "The Trial Justice".

⁶⁷⁵ *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 391 (S.C.C.).

⁶⁷⁶ *R. v. Bourassa* (1991), 67 C.C.C. (3d) 143 (Que. C.A.).

The following comments define the scope of permissible questions during cross-examination:

That full cross-examination of an opposite witness should be permitted by the trial Judge is well settled. The Judge may check cross-examination if it becomes irrelevant, or prolix, or insulting, but so long as it may fairly be applied to the issue, or touches the credibility of the witness it should not be excluded.⁶⁷⁷

While the trial justice is duty bound to limit "irrelevant, or prolix" cross-examination, it is a reversible error to impose in advance a time limit or restrictions upon the length of cross-examination.⁶⁷⁸

(iii) Suggestions

Suggestions made during cross-examination of a witness, although not admissible as evidence, can, in some circumstances, prejudice the trier of fact against the witness, regardless of the answer given.

In *R. v. Howard*, Lamer J. (as he then was), writing for the majority, observed that "[i]t is not open to the examiner or cross-examiner to put as fact, or even hypothetical fact, that which is not and will not become part of the case as admissible evidence."⁶⁷⁹ Accordingly, the party cross-examining a witness should be in a position to support, with evidence, a prejudicial suggestion before that suggestion is made to a witness.

(iv) The Collateral Fact Rule

The collateral fact rule is this: a party is not entitled to introduce evidence solely to contradict the evidence of a witness given in chief or on cross-examination.⁶⁸⁰ Evidence tendered to contradict a witness will not be admissible unless, in addition to contradicting the witness, the evidence is relevant to a material issue in the case, or the evidence falls within an exception to the collateral fact rule.⁶⁸¹ Thus, for example, a party will not be permitted to adduce the prior inconsistent statement of a witness unless the statement contradicts the witness' testimony regarding a material issue.

⁶⁷⁷ *R. v. Anderson* (1938), 70 C.C.C. 275 at 279 (Man. C.A.).

⁶⁷⁸ *R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 at 141 (Ont. C.A.).

⁶⁷⁹ *R. v. Howard* (1989), 48 C.C.C. (3d) 38 at 46 (S.C.C.).

⁶⁸⁰ *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 391-392 (S.C.C.).

⁶⁸¹ *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 275. (Ont. C.A.)

Concerns related to trial economy and efficiency underlie the collateral fact rule. In the absence of the rule, trials would be prolonged and become sidetracked by the resolution of numerous extraneous issues.⁶⁸²

(v) The Rule in *Browne v. Dunn*

The rule in *Browne v. Dunn* is this: where the cross-examiner intends to adduce evidence to contradict the testimony of a witness, the witness must be given notice of this intention.⁶⁸³ Accordingly, contradictory evidence should be put to the witness while the witness is still in the box, and the witness should be given an opportunity to explain the contradiction.⁶⁸⁴

The rule in *Browne v. Dunn* is not absolute.⁶⁸⁵ The rationale behind the rule is ensuring fairness to the witness and to the parties.⁶⁸⁶ What fairness requires depends upon the circumstances of the case.⁶⁸⁷ Accordingly, the failure to put contradictory evidence to a witness during cross-examination does not preclude a party from leading that evidence through another witness. The weight to be attached to contradictory evidence that the witness has not had the opportunity to explain depends upon the circumstances of the particular case.⁶⁸⁸

(vi) Improper Questions

It is improper to ask the following questions during cross-examination;⁶⁸⁹

- whether the witness is lying or committing perjury;⁶⁹⁰
- to express an opinion about the veracity or truthfulness of another witness, or whether another witness is lying; or
- where the evidence of another witness contradicts the witness' evidence, to express an opinion about why the other witness would be lying.⁶⁹¹

To ask the defendant why he or she declined giving a statement to the investigating

682 Sopinka, J.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 963.

683 *Browne v. Dunn* (1893), 6 R. 67 at 70-71 (H.L.).

684 *Peters v. Perras* (1909), 42 S.C.R. 244

685 *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 at 209-210 (S.C.C.).

686 *Browne v. Dunn* (1893), 6 R. 67 at 70-71, 76-77 (H.L.).

687 *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 at 209-210 (S.C.C.).

688 *R. v. MacKinnon* (1992), 72 C.C.C. (3d) 113 at 120 (B.C. C.A.).

689 See also *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.).

690 *R. v. Sherry* (1995), 103 C.C.C. (3d) 276 (Ont. C.A.); *R. v. Yakeleya* (1985), 20 C.C.C. (3d) (Ont. C.A.).

691 *R. v. Vandenberghe* (1995), 96 C.C.C. (3d) 371 (Ont. C.A.); *R. v. Defrancesca* (1995), 104 C.C.C. (3d) 189 (Ont. C.A.).

officer; to do so violates the defendant's right to remain silent.⁶⁹²

c. Credibility

(i) Generally

Credibility of a witness is a question of fact.⁶⁹³ A witness puts his or her credibility in issue upon taking the stand to testify.⁶⁹⁴ A witness may be discredited or impeached in a variety of ways;⁶⁹⁵

- by showing bias, prejudice, interest or corruption;
- by attacking the witness' character by raising prior convictions, prior bad acts or prior reputation;
- by contradicting the witness through previous inconsistent statements.;
- by challenging the witness' capacity to observe, recall and communicate accurately;
- by putting contrary evidence to the witness; and
- by showing that the witness' evidence is contrary to common experience.

The use of a witness' prior convictions and/or prior inconsistent statements during cross-examination are reviewed below.

(ii) Prior Convictions

(1) Generally

Prior convictions, in general, are relevant to a witness' credibility. Any witness, including the defendant, may be cross-examined on prior convictions. If the witness refuses to answer or denies the conviction, the cross-examiner may prove the prior conviction(s).

⁶⁹² *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.); leave to appeal rel'd (1993), 81 C.C.C. (3d) vi (S.C.C.).

⁶⁹³ *R. v. White* (1947), 89 C.C.C. 148 (S.C.C.).

⁶⁹⁴ *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385 (S.C.C.).

⁶⁹⁵ D. Paciocco and L. Streusser, *The Law of Evidence in Canada* (Concord: Irwin, 1996) at 222.

This is clear from section 22 OEA:

22. A witness may be asked whether he or she has been convicted of any crime, and upon being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

On the surface, s. 22 permits the introduction of bad character evidence. It is important to appreciate that evidence of prior convictions is relevant only to credibility. Evidence of prior convictions, especially for similar offences, is not admissible to support the inference that the defendant is the type of person likely to have committed the offence charged.

In practice, any question asked of a witness regarding a prior conviction should identify the offence, the date and place of conviction, and the punishment imposed. If the witness acknowledges the prior conviction, proof of the prior conviction is not necessary.

(2) Prior Convictions of the Defendant

Special considerations arise where it is sought to cross-examine the defendant on prior convictions. In *R. v. Corbett*, the Supreme Court of Canada summarized the rules related to cross-examining a defendant on his or her prior criminal record.⁶⁹⁶

- Cross-examination is limited to the fact of the conviction. The defendant may not be cross-examined on the conduct underlying the conviction.
- The defendant can not be cross-examined on whether he testified.
- Cross-examination is limited to convictions only – discharges are not included.

Furthermore, it was recognized in *Corbett* that in appropriate cases, a trial justice has a discretion to exclude unfairly prejudicial evidence of the defendant's prior convictions. The factors to be considered in making this determination are the following;⁶⁹⁷

- the nature of the prior conviction – convictions for crimes of dishonesty, such

⁶⁹⁶ *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.); *R. v. Harter* (1995), 101 C.C.C. (3d) 193 (S.C.C.).

⁶⁹⁷ *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.); *R. v. Harter* (1995), 101 C.C.C. (3d) 193 (S.C.C.); *R. v. P.(G.F.)* (1994), 89 C.C.C. (3d) 176 (Ont. C.A.).

as perjury or fraud, are far more relevant to credibility than a conviction for assault;⁶⁹⁸

- similarity between the prior conviction and offence charged – the greater the similarity between the prior conviction and the offence charged, the greater the prejudice to the defendant;
- the date of the conviction – convictions entered a long time ago should generally be excluded; and
- the conduct of the defence – where the defendant has attacked the credibility of prosecution witnesses, it may be unfair not to permit cross-examination of the defendant on prior convictions.

A defendant is absolutely entitled to know before choosing to testify whether or not he will be cross-examined on prior convictions.⁶⁹⁹ Accordingly, admissibility of prior convictions should be determined on a “*Corbett* Application” at the close of the prosecution’s case.

(3) Prior Inconsistent Statements

a. Generally

At common law, a witness may be discredited or impeached by contradicting a prior inconsistent statement, whether written or oral. Contradicting a witness with a prior statement is powerful ammunition in support of the argument that the witness is untrustworthy. Given the prior inconsistent statement, it is not unreasonable to conclude that only one, or neither of the witness’ stories is true.

The procedure for cross-examination on prior statements is governed by sections 20 and 21 *Ontario Evidence Act* (OEA). Section 20 applies to prior inconsistent statements reduced to writing, while s. 21 applies to prior inconsistent oral statements.

Section 20 OEA provides:

A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called

698 See *Deep v. Wood* (1983), 143 D.L.R. (3d) 246 (Ont. C.A.), and *Street v. Guelph (City)*, [1965] 2 C.C.C. 215 (Ont. H.C.J.) regarding the propriety of cross-examining a witness on prior convictions for provincial offences.

699 *R. v. Underwood* (1998), 121 C.C. C. (3d) 117 (S.C.C.).

to those parts of the writing that are to be used for the purpose so contradicting the witness, and the judge or other person presiding at any time during the trial or proceedings may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit.

Section 21 OEA provides:

21. If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement.

b. Statement Reduced to Writing

A statement reduced to writing includes a signed statement given by the witness on a prior occasion, and prior testimony of the witness. It also includes notes taken verbatim by a police officer while the statement was made. It does not, however, include notes made of a witness' statement after the fact.⁷⁰⁰

c. Procedure For Cross-Examination on Prior Inconsistent Statement

There is no requirement that the prior statement must be proved inconsistent before it is put to the witness during cross-examination.⁷⁰¹ It is equally clear from s. 10 OEA that the witness does not have to be shown his prior statement before he is cross-examined on it. However, the witness' attention must be drawn to the contradictory parts of the prior statement before it is proved in evidence.⁷⁰²

The following is a suggested approach for contradicting a witness with his or her prior inconsistent statement.⁷⁰³

- First, "anchor" the witness to his or her current testimony. This can be done by having the witness repeat the evidence you intend to contradict. It is also advisable to have the witness fully clarify what she meant when she testified,

700 *R. v. Carpenter (No. 2)* (1982), 1 C.C.C. (3d) 149 (Ont. C.A.); *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.); *R. v. Deacon* (1947), 89 C.C.C. 1 (S.C.C.).

701 *R. v. Savion* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.).

702 *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.).

703 See E.J. Levy, *Examination of Witnesses in Criminal Cases*, 3d ed. (Scarborough: Carswell, 1994) at 117.

to provide as little leeway possible for the witness to subsequently explain any contradiction revealed by the prior inconsistent statement.

- Next, ask the witness whether she recalls making a statement on a certain date. The date, time and circumstances surrounding the making of the prior inconsistent statement, including who was present, should be put to the witness.
- Put the prior statement to the witness.
- If you want the witness to adopt the prior inconsistent statement, *i.e.* the prior statement is favourable to your position, ask whether the statement was true. If the answer is yes, no further questions need be asked. If the witness denies that the truth of the prior statement, canvass the circumstances surrounding the making of the statement which suggest the prior statement was truthful.
- If you simply want to demonstrate that the witness has made a prior inconsistent statement for the purposes of impeaching the witness' credibility, have the witness agree that the statements are inconsistent, and that only one could be true. In effect, the witness is telling you he or she is a liar.

Note that where the witness denies having made the prior statement, it will be necessary to prove the statement through independent evidence.

d. Evidential Value of Prior Inconsistent Statements

At common law, where the witness admits the truth of a prior inconsistent statement, or adopts the statement as part of the present testimony, the prior statement can be used by the trier of fact in support of the truth of its contents. Where, however, the witness does not admit the truth of the prior statement, *i.e.* maintains the truth of the present testimony, or insists that the prior statement was not made, or was made but is not true, the trier of fact may not use the statement as proof of the truth of its contents. The statement may only be used to assess the witness' credibility. Note, however, that when evidence of a prior inconsistent statement is adduced, the trier of fact is entitled to assign no weight to the witness' present testimony.⁷⁰⁴

Following the Supreme Court of Canada's decision in *R. v. B.(K.G.)*,⁷⁰⁵ a prior

704 *R. v. Deacon* (1947), 89 C.C.C. 1 (S.C.C.); *R. v. Kuldiip* (1990), 61 C.C.C. (3d) 385 (S.C.C.); *R. v. Kadishevitz* (1934), 61 C.C.C. 93 (Ont. C.A.).

705 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

inconsistent statement may be admissible for the truth of its contents where the dual requirements of necessity and reliability are satisfied.

4.12.7 Re-examination

Once the defendant has completed his cross-examination of a prosecution witness, the prosecutor may choose to re-examine the witness.

Two purposes are served by re-examination. The first purpose is to give the witness the opportunity to explain or clarify answers given during cross-examination. This may be necessary where the defendant has attacked the accuracy of the witness' testimony, or where there are discrepancies between the witness' testimony in chief and in cross-examination.

The second purpose served by re-examination is to rehabilitate the credibility of the witness. This may be necessary where the defendant has attacked the truthfulness of the witness.

As is the case during examination-in-chief, the prosecutor generally may only ask open-ended questions of a witness during re-examination. Furthermore, questions asked during re-examination are restricted to issues that arose out of the cross-examination of the witness. The prosecutor may not introduce new facts, nor simply review evidence given by the witness in chief.

4.12.8 Motion for *Non-Suit*

After the prosecutor has presented all of the evidence against the defendant, the defendant will be called upon to respond to the prosecution case. Typically, the defendant will elect to call evidence. Before doing so, however, the defendant may move for the case to be dismissed on the ground that the prosecution has not established a case to meet. This is called a motion for *non-suit*. If the defendant is successful, the court will enter a directed verdict of acquittal.

To get a directed verdict of acquittal, the defendant must satisfy the court that the prosecution has not met what is commonly referred to as the *Shepard* test: has the prosecutor adduced any admissible evidence upon which a reasonable jury properly

instructed could convict?⁷⁰⁶ In other words, the court is being asked to find that the prosecutor has not made out a *prima facie* case. A *prima facie* case is established if there is admissible evidence on all essential elements of the offence charged which, if believed, would permit a reasonable trier of fact to convict.⁷⁰⁷ For example, the identity of the perpetrator must be established in all cases. If none of the prosecution witnesses identify the defendant as being the perpetrator of the offence, a *prima facie* case has not been established, and the defendant does not have to respond to the prosecutor's case. Instead, a verdict of acquittal is entered.

The jurisdiction of the trial justice hearing the motion for *non-suit* is restricted to simply determining whether evidence has been adduced on all elements of the offence. At this stage of the trial, the court is not concerned with the guilt or innocence of the defendant. The court does not weigh the evidence or assess the credibility of witnesses.⁷⁰⁸ Nor is the trial justice to draw inferences of fact from the evidence.⁷⁰⁹ These functions are reserved to the trial justice in his or her capacity as trier of fact.⁷¹⁰ Accordingly, if the prosecutor has adduced evidence on all elements of the offence, even evidence that is manifestly unreliable or dubious, the motion for non-suit should be dismissed and the defendant called upon to answer the case against him or her.⁷¹¹

4.12.9 Reply

At the close of the defendant's case, the court has the discretion to permit the prosecutor to call reply evidence to contradict or qualify evidence adduced by the defendant. Reply evidence may only be called to rebut new issues or defences raised by the defendant that the prosecutor has not had an opportunity to deal with, and which the prosecutor could not reasonably have foreseen.⁷¹² If the prosecutor was aware of the proposed reply evidence during the prosecutor's case in chief, and the prosecutor reasonably should have anticipated that the defendant would deny the evidence, the court, in general, will not permit the evidence to be adduced in reply.

706 *United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.).

707 *United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.); *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 at 229-30 (S.C.C.). See also *R. v. Rocca*, [1993] O.J. No. 3221 [unreported], (Ont. Ct. (Prov. Div.)) (Q.L.), where the learned justice of the peace erred in requiring "proof" as opposed to "any evidence" of an element.

708 *United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424 at 430 (S.C.C.).

709 *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 at 198 (S.C.C.).

710 *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 at 198 (S.C.C.); *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 at 229-30 (S.C.C.).

711 *R. v. Collins and Pelfrey* (1993), 79 C.C.C. (3d) 204 at 213 (Ont. C.A.).

712 *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 390-391 (S.C.C.); *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 273 (Ont. C.A.).

In *R. v. Campbell*, Martin J.A. said the following about the limits on calling reply evidence:

The general rule with respect to the order of proof is that the prosecution must introduce all the evidence in its possession upon which it relies as probative of guilt, before closing its case [citations omitted]. The rule prevents the accused being taken by surprise, and being deprived of an adequate opportunity to make a proper investigation with respect to the evidence adduced against him. The rule also provides a safeguard against the importance of a piece of evidence, by reason of its late introduction, being unduly emphasized or magnified in relation to the other evidence.

Rebuttal evidence by the prosecution is restricted to evidence to meet new facts introduced by the defence. The accused's mere denial of the prosecution's case in the witness-box does not permit the prosecution in reply to reiterate its case, or to adduce additional evidence in support of it. In practice, however, it may often be difficult to distinguish between evidence, properly the subject of rebuttal, and evidence of facts relevant to prove guilt which should have been proved in the first instance by a full presentation of the prosecution's case [citations omitted].

The Court has, however, a discretion to admit evidence in reply which has become relevant to the prosecution's case as a result of defence evidence which the Crown could not reasonably be expected to anticipate.⁷¹³

The rationale underlying the reply evidence rule is based upon our adversarial system of justice, and in particular a concern that the prosecution not be allowed to split its case against the defendant. In our system of justice, the prosecutor is obliged to establish a case to meet before the defendant is called upon to defend himself. To establish its case against the defendant, the prosecutor must adduce all relevant evidence in its possession that it intends to rely upon with respect to all issues raised in the case.⁷¹⁴ In particular, the prosecutor must adduce all evidence that it intends to rely on to prove the elements of the offence during the prosecution's case in chief.⁷¹⁵

At the close of the prosecutor's case, the defendant may elect to remain silent, or may elect to testify in his defence. For this right to be meaningful, the defendant must be fully aware of the case against him.⁷¹⁶ By mandating that the defendant be aware of the case to be met before mounting a defence, the rule "prevents unfair surprise, prejudice and

713 *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 at 26 (Ont. C.A.).

714 *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 390-391 (S.C.C.).

715 *R. v. Atkian* (1990), 62 C.C.C. (3d) 357 at 362-363 (Ont. C.A.).

716 *R. v. John* (1985), 23 C.C.C. (3d) 326 at 329-330 (S.C.C.).

confusion which could result if the [prosecutor was] allowed to split its case", that is, putting in part of its evidence, closing its case, and then after the defence is complete adding further evidence to bolster the position originally advanced.⁷¹⁷

Consequently, reply evidence will not be permitted regarding matters "which merely confirm or reinforce earlier evidence adduced in the [prosecutor's] case which should have been brought before the defence was made."⁷¹⁸

In *R. v. P.(G.)*, the Ontario Court of Appeal held that, although the Crown must call all clearly relevant evidence it intends to rely on during its own case, a trial judge has a discretion to admit reply evidence on an issue of marginal importance during the prosecution's case in chief that takes on added significance as a result of defence evidence.⁷¹⁹ Moreover, the trial judge may admit reply evidence relevant to an issue raised during the cross-examination of Crown witnesses, provided that it was not a "live issue" at the close of the Crown's case, the evidence adduced by the defence subsequently makes the issue clearly relevant, and the admission of the reply evidence does not result in unfairness to the accused.⁷²⁰

In contrast, in *R. v. Perry*, reply evidence was not permitted to rebut the defendant's allegation that force was used to extract a statement from him. Because the defendant made the same allegations while testifying on a *voir dire* into the voluntariness of the statement, the Crown reasonably should have anticipated the allegations being reasserted during the defence case.⁷²¹

The admissibility of reply evidence is further limited in the following circumstances.

a. The Collateral Fact Rule

The collateral fact rule provides that answers given by a witness to questions put to him or her in cross-examination related to a collateral matter or fact are treated as final, and can not be contradicted by evidence called in reply.⁷²² A matter is collateral where it is not related to an issue raised in the case, nor relevant to matters which must be proved for the

717 *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 390-391 (S.C.C.).

718 *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 390-391 (S.C.C.); *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 273 (Ont. C.A.).

719 *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 273-275 (Ont. C.A.). See also *R. v. Perry* (1977), 36 C.C.C. (2d) 209 at 213 (Ont. C.A.); and the dissent of Doherty J.A. in *R. v. Melnychuk* (1996), 104 C.C.C. (3d) 160 at 172 (Ont. C.A.), rev'd for the reasons of Doherty J.A. (1997), 114 C.C.C. (3d) 503 (S.C.C.).

720 *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 (Ont. C.A.).

721 *R. v. Perry* (1977), 36 C.C.C. (2d) 209 at 213 (Ont. C.A.).

722 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths 1999) at 963.

determination of the case.⁷²³

The rule against reply on collateral issues is aimed at preventing the prosecutor from splitting its case.⁷²⁴ The efficient use of judicial resources is an additional consideration. Without the collateral fact rule, trials may be prolonged and become sidetracked by the resolution of numerous extraneous issues.⁷²⁵ Consequently, the prosecutor is not entitled to introduce extrinsic evidence to contradict the testimony of a defence witness unless the extrinsic evidence is also relevant to some issue in the case aside from the witness' credibility.⁷²⁶ However, where the reply evidence is related to an essential element of the case aside from credibility, concerns about case splitting and trial economy will not override the importance of providing the Justice of the Peace with important and relevant evidence.⁷²⁷

While the prosecutor may cross-examine the witness further on the answers given, where a witness during cross-examination provides an untruthful or mistaken answer to a question relevant to a collateral issue, the prosecutor will not be permitted to adduce evidence in reply to rebut the witness' testimony. In this sense it is said that the prosecutor is "bound" by the answers given with respect to collateral issues. However, neither the prosecutor nor the Justice of the Peace is bound to accept the witness' testimony as true. "The answer is binding and final only in the sense that rebuttal evidence may not be called in contradiction."⁷²⁸

b. Reply to Alibi Evidence

Where the prosecutor has received notice of an alibi, the trial judge should not permit the prosecutor to adduce reply evidence to rebut the alibi. Once notice of the alibi has been received, the prosecutor should foresee that the defence of alibi will be advanced during the defence case in chief.⁷²⁹ To permit the prosecutor to adduce rebuttal evidence in these circumstances would allow the prosecutor to split its case and essentially restate its evidence. Moreover, because the contradiction of the defendant's alibi is the last evidence heard by the trier of fact, the contradiction and its impact upon the defendant's

⁷²³ *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 391-392 (S.C.C.); *R. v. Aalders* (1993), 82 C.C.C. (3d) 215 at 230 (S.C.C.).

⁷²⁴ *R. v. Aalders* (1993), 82 C.C.C. (3d) 215 at 230 (S.C.C.).

⁷²⁵ Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths 1999) at 963.

⁷²⁶ *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 275-276 (Ont. C.A.).

⁷²⁷ *R. v. Aalders* (1993), 82 C.C.C. (3d) 215 at 230 (S.C.C.); *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263 at 275-276 (Ont. C.A.).

⁷²⁸ *R. v. Krause* (1986), 29 C.C.C. (3d) 385 at 392 (S.C.C.).

⁷²⁹ *R. v. Jackson* (1987), 38 C.C.C. (3d) 91 at 95-97 (B.C. C.A.).

credibility may be unduly emphasized or magnified in relation to the other evidence.⁷³⁰

In *R. v. Biddle*, the Supreme Court of Canada held that the trial judge improperly permitted the Crown to adduce reply evidence to rebut the accused's alibi. Since the Crown was aware of the accused's alibi from his statement to the police, the accused's testimony did not raise any new and unanticipated issues permitting the reception of reply evidence.⁷³¹

c. *Prior Inconsistent Statements*⁷³²

Sections 20 and 21 of the *Ontario Evidence Act*⁷³³ govern the procedure for cross-examining a witness on prior inconsistent statements. Section 20 applies to statements reduced to writing, while section 21 applies to oral statements.

d. *Surrebuttal*

Pursuant to section 46(2) of the *POA*, the defendant is entitled to make full answer and defence. The right of the defendant to make full answer and defence applies to evidence given by way of reply as well as to evidence given during the prosecutor's case in chief.⁷³⁴

The purpose of surrebuttal is to provide the defendant with an opportunity to challenge or explain facts or issues raised by the prosecutor for the first time during reply.⁷³⁵ The defendant may not simply review or bolster its case in chief. Recall that during reply, the prosecutor may only adduce evidence necessary to address new issues raised by the defence case in chief. Consequently, circumstances in which surrebuttal evidence will be permitted are few. However, the rules regarding the permissible scope of surrebuttal evidence are to be applied liberally in favour of the defendant.⁷³⁶

Depending upon the circumstances of the particular case, permitting the defendant to call surrebuttal evidence may or may not remove any prejudice occasioned to the defendant by the improper reception of reply evidence.⁷³⁷

730 *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.).

731 *R. v. Biddle* (1995), 96 C.C.C. (3d) 321 (S.C.C.). See also *R. v. Terceira* (1998), 123 C.C.C. (3d) 121 at 36 (Ont. C.A.).

732 Prior Inconsistent Statements are discussed in Section 4.12.6 (c)(3) of the Handbook.

733 R.S.O. 1990, c. E.23 [Am. S.O. 1993, c. 27, Sched.; 1995, c. 6, s.6; 1996, c. 25, Pt. III, s. 5].

734 *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 at 283 (B.C. C.A.).

735 *R. v. Morgentaler* (No. 3) (1973), 14 C.C.C. (2d) 453 at 455 (Que. Q.B.); *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 at 283-284 (B.C. C.A.).

736 *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 at 283 (B.C. C.A.).

737 *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193 (S.C.C.); *R. v. Biddle* (1995), 96 C.C.C. (3d) 321 at 332-333 (S.C.C.).

The comments of Sopinka J. in *R. v. Biddle* are instructive:

It cannot be said that, as a general proposition, the ability to call surrebuttal evidence removes any prejudice caused to an accused where the rebuttal evidence was improperly adduced in the first place thereby allowing the Crown to split its case. Unlike in *R. v. Chaulk*, for the reasons noted above, here the appellant can make a serious argument that the fact the Crown's evidence was adduced in rebuttal rather than in-chief was prejudicial, notwithstanding the ability to call evidence in surrebuttal.

It is also worthy to note that if one accepts the contention that calling surrebuttal evidence removes any prejudice of allowing the Crown to adduce reply evidence which ought to have been brought out in the case-in-chief, then the rule against splitting the case would effectively be emasculated. The Crown would be allowed to split its case as long as the accused was given a chance to reply. This would defeat the very rationale behind the rule against splitting the case. Surely, this is an unacceptable result.⁷³⁸

4.12.10 Re-opening

a. Generally

The trial justice has the discretion to permit either party to re-open its case at different points during the course of the trial.⁷³⁹ Re-opening a case is distinct from reply or rebuttal evidence. Re-opening a case is not done in response to a new matter or issue raised by the defendant's case. Rather, re-opening may be permitted where a party has failed to present important evidence through oversight or inadvertence earlier in the proceedings, or if an issue or matter has arisen that could not have been foreseen by either party.

b. Re-opening by the Prosecutor

The trial justice may permit the prosecutor to reopen its case to prove a necessary element of the offence charged where, through inadvertence, it has closed its case too soon.⁷⁴⁰

⁷³⁸ *R. v. Biddle* (1995), 96 C.C.C. (3d) 321 at 332-333 (S.C.C.).

⁷³⁹ *R. v. Robillard* (1978), 41 C.C.C. (2d) 1 (S.C.C.).

⁷⁴⁰ *R. v. Cachia* (1974), 17 C.C.C. (2d) 173 (Ont. H.C.); *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 (S.C.C.).

In *R. v. P.(M.B.)*, the Supreme Court of Canada identified the principle against self-incrimination as being the rationale underlying the re-opening rule.⁷⁴¹ A fundamental principle underlying the criminal law is that until the prosecutor has established a case to meet, the defendant is not required to respond to the charge against him. Only when the prosecutor has established a *prima facie* case must the defendant answer the case against him or her, or risk being convicted. The principle against self-incrimination is jeopardized indirectly where the prosecutor is allowed to re-open its case after the defendant has started to answer the charge.

In determining whether to permit the prosecutor to re-open its case, the fundamental consideration is whether the defendant will suffer prejudice in his defence.⁷⁴² The primary factors affecting this determination are the stage of the proceedings that the prosecutor has brought its application, and the nature of the evidence sought to be called.⁷⁴³ In general, the discretion to permit the prosecutor to re-open its case becomes narrower as the trial proceeds because of the increasing likelihood of prejudice to the defence as the trial progresses.⁷⁴⁴ The Supreme Court of Canada in *R. v. P.(M.B.)* defined three stages of the trial where the prosecutor may seek to re-open, and the test to be applied at each stage:

1. Before the prosecutor has closed its case, the trial justice has wide discretion to permit the prosecutor to recall a witness to correct earlier testimony. Any prejudice occasioned to the defendant can be cured by an adjournment, permitting the cross-examination of the witness or other witnesses, and or a review of the record to determine whether certain portions of the evidence should be struck.⁷⁴⁵
2. Once the prosecutor has closed its case, the trial justice's discretion to permit the prosecutor to re-open is narrow. The second stage arises after the prosecutor has closed its case and the defendant has moved for non-suit. Re-opening will be permitted only where, through oversight or inadvertence, the prosecutor has failed to prove a necessary element of its case, provided that the interests of justice require it and the defence will not be prejudiced.⁷⁴⁶ Thus, in *R. v. Cachia*, the Crown was permitted to recall a witness to correct an error regarding the date of the alleged

741 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 303 to 307 (S.C.C.).

742 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 298 (S.C.C.); *R. v. Schofield* (1996), 148 N.S.R. (2d) 175 (C.A.).

743 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 300 (S.C.C.).

744 *R. v. G.(S.G.)* (1997), 116 C.C.C. (3d) 193 (S.C.C.); *R. v. M.(F.S.)* (1996), 111 C.C.C. (3d) 90 (Ont. C.A.); *R. v. Schofield* (1996), 148 N.S.R. (2d) 175 (C.A.).

745 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 298 (S.C.C.).

746 *R. v. Cachia* (1974), 17 C.C.C. (2d) 173 at 175 (Ont. H.C.); *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 298-299 (S.C.C.).

offence.⁷⁴⁷

3. The third stage arises after the prosecutor has closed its case and the defendant has started to call evidence. The trial justice's discretion to permit the prosecutor to re-open in these circumstances is very restricted.⁷⁴⁸ There is a real concern that permitting the prosecutor to re-open its case in these circumstances indirectly jeopardizes the defendant's right not to be conscripted against himself or herself. There is a danger that, based upon what has been heard from the defendant, the prosecutor may seek to fill gaps in the proof against the defendant, or change the case that the defendant must meet after the defendant has started to respond.⁷⁴⁹

Consequently, as a general rule, the prosecutor will not be permitted to re-open its case once the defendant has started to answer the case against him unless: (1) the conduct of the defendant has led to the prosecutor's oversight or inadvertence; (2) the evidence sought to be adduced is relevant to a matter of form only, and not to the substance or merits of the case; or (3) other exceptional circumstances exist.⁷⁵⁰

The onus is on the prosecutor to justify the re-opening. The prosecutor must explain why the evidence was not led earlier, and must explain why the defendant will not be prejudiced in his or her defence.⁷⁵¹

The trial justice has a broader discretion to permit a re-opening where the prosecutor seeks to re-open its case to protect the interests of the defendant. In general, the trial justice should permit the prosecutor to re-open its case where the interests of the defendant warrant it, no matter how late in the proceedings the application is brought.⁷⁵²

c. Re-opening by the Defendant

The trial justice may permit a defendant to re-open its case at any point prior to sentence, even after a finding of guilt.⁷⁵³ Once the sentence has been imposed, the trial justice is *functus officio* and cannot permit either party to re-open its case.⁷⁵⁴

The trial justice has a wide discretion to permit a defendant to re-open its case prior to a

747 *R. v. Cachia* (1974), 17 C.C.C. (2d) 173 (Ont. H.C.).

748 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 301 and 306-307 (S.C.C.).

749 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 306 (S.C.C.); *R. v. M.(F.S.)* (1996), 111 C.C.C. (3d) 90 at 93 (Ont. C.A.).

750 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 301 and 306-307 (S.C.C.).

751 *R. v. G.(S.G.)* (1997), 116 C.C.C. (3d) 193 (S.C.C.).

752 *R. v. P.(M.B.)* (1994), 89 C.C.C. (3d) 289 at 307 (S.C.C.).

753 *R. v. Scott* (1990), 61 C.C.C. (3d) 300 at 319-320 (S.C.C.); *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 at 72-73 (Ont. C.A.); *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 at 197 (Ont. C.A.).

754 *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 at 72-73 (Ont. C.A.).

verdict being rendered. To permit the defendant to re-open its case prior to a verdict being rendered, the trial justice should consider:

- the relevance of the proposed evidence. The trial justice should be satisfied that the proposed evidence is relevant to a material issue;⁷⁵⁵
- the trial justice should then consider the potential prejudice to the prosecutor if the defendant is permitted to re-open its case; and
- finally, the trial justice must consider the effect the re-opening will have on the orderly and expeditious conduct of the trial.

The trial justice may also permit the defendant to re-open its case following a finding of guilt but prior to sentence. The discretion to do so, however, "should only be exercised in exceptional circumstances and where its exercise is clearly called for."⁷⁵⁶ In *R. v. Kowal*, the Ontario Court of Appeal noted that once a conviction has been entered, "a more rigorous test for re-opening is required to protect the integrity of the process, including enhanced interest in finality," than when the application is made prior to conviction.⁷⁵⁷

The court in *Kowal* opined that the test for the admission of fresh evidence on appeal should be applied to determine whether the defendant should be permitted to re-open its case following conviction. That test is the following:⁷⁵⁸

- the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

755 *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 at 197 (Ont. C.A.).

756 *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 at 73 (Ont. C.A.).

757 *R. v. Kowal* (1996), 108 C.C.C. (3d) 481 at 493 (Ont. C.A.).

758 *R. v. Kowal* (1996), 108 C.C.C. (3d) 481 at 493 (Ont. C.A.). See also *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.).

The court added:

In addition to the *Palmer* criteria, a trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial. Counsel must make tactical decisions in every case. Assuming those decisions are within the boundaries of competence, an accused must ordinarily live with the consequences of those decisions. Should the trial judge find that the test for reopening has been met, then the judge must consider whether to carry on with the trial or declare a mistrial.⁷⁵⁹

4.13 Defences

4.13.1 Generally

Section 80 of the *POA* provides:

80. Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act.

Pursuant to s. 80 of the *POA*, common law defences are incorporated into proceedings under the *Act*. These defences include automatism, necessity, entrapment, officially induced error of law,⁷⁶⁰ and *de minimis non curat lex*.

A number of defences available to offences punishable under the *Criminal Code*, such as duress, self-defence, insanity, protection of persons administering and enforcing the law, and defence of property, are not available as defences in proceedings under the *POA*. This latter group of defences do not exist at common law. Rather, they have been statutorily created by the *Criminal Code*. Despite recommendations that these defences should be available in *POA* proceedings,⁷⁶¹ provision has not been made in the *POA* for the applicability of this group of defences.

759 *R. v. Kowall* (1996), 108 C.C.C. (3d) 481 at 493-494 (Ont. C.A.).

760 Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offences* (Toronto: Queen's Printer, 1990) at 50.

761 Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offences* (Toronto: Queen's Printer, 1990) at 51.

4.13.2 Excuses and Justifications

A useful way of conceptualizing defences is by classifying them as either an excuse or as a justification. An excuse is a defence that acknowledges the wrongfulness of the defendant's conduct, but holds that in the circumstances of its commission the defendant should not be punished for the offence.⁷⁶² A justification, in contrast, challenges the wrongfulness of an action which technically constitutes a crime.

4.13.3 Necessity

The defence of necessity operates to excuse a defendant's conduct where the defendant's non-compliance with the law was "normatively involuntary." The rationale underlying the defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

[The defence of necessity] rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in *The Nicomachean Ethics* ..., "overstrains human nature and which no one could withstand".

Given that the rationale underlying the necessity defence is the recognition that it is inappropriate to punish involuntary conduct, the following limitations are placed on the defence:⁷⁶³

- the defendant must have acted to avoid a clear and imminent risk of peril;
- there must have been no reasonable alternative to disobeying the law;

⁷⁶² *R. v. Perka* (1984), 14 C.C.C. (3d) 385 at 396 (S.C.C.).

⁷⁶³ *R. v. Perka* (1984), 14 C.C.C. (3d) 385 at 400-403 (S.C.C.); *R. v. Latimer* (1998), 131 C.C.C. (3d) 191 at 200 (Sask. C.A.).

- there must be proportionality between the illegal act and the harm sought to be avoided – the harm caused by the illegal act must be less than the harm sought to be avoided; and
- the harm sought to be avoided must not have been foreseeable.

Before the defence of necessity will be considered by the trier of fact, the defendant has the evidential burden of pointing to some evidence which gives rise to the defence. This burden can be met either through cross-examination of prosecution witnesses, or through the evidence called by the defence. Where the evidence gives rise to an air of reality to the defence of necessity, it is incumbent upon the prosecution to disprove the defence as part of the burden of proving the defendant's guilt beyond a reasonable doubt. If the evidence of necessity leaves the trier of fact with a reasonable doubt regarding the defendant's guilt, the charge must be dismissed.

a. Specific Applications of the Necessity Defence

In *Perka*, Dickson J. notes that classic applications of the necessity defence include “the more mundane case of the motorist who exceeds the speed-limit taking an injured person to the hospital.”⁷⁶⁴ The necessity defence was specifically applied to dismiss a charge of speeding against the defendant in *R. v. Kennedy*.⁷⁶⁵ It is clear however that the defence will apply only where there was an imminent peril to the life or safety of a person. The defence will not apply where, for example, the defendant was speeding in order to be on time for an appointment.⁷⁶⁶

In *R. v. Walker*,⁷⁶⁷ it was held that the defence may, in appropriate circumstances, apply to the offence of “stop sign.”

It has been held that the offence of necessity can never operate to avoid a peril authorized by law.⁷⁶⁸ This principle could be applied in trespassing prosecutions involving political protestors.

⁷⁶⁴ *R. v. Perka* (1984), 14 C.C.C. (3d) 385 at 393 and 396 (S.C.C.).

⁷⁶⁵ *R. v. Kennedy* (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.).

⁷⁶⁶ *R. v. Paul* (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.). For cases which have considered the defence of necessity in circumstances where the defendant acted to avoid a tail-gating vehicle, see *R. v. Walls* (1986), 47 M.V.R. 92 (B.C. Co. Ct.); *R. v. Fry* (1977), 36 C.C.C. (2d) 396 (Sask. Prov. Mag. Ct.), and *R. v. Morris* (1994), 5 M.V.R. (3d) 110 (B.C. S.C.).

⁷⁶⁷ *R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.).

⁷⁶⁸ *MacMillan Bloedel v. Simpson* (1994), 89 C.C.C. (3d) 217 (B.C. C.A.), aff'd 103 C.C.C. (3d) 225 (S.C.C.).

4.13.4 Ignorance of the Law

At common law, ignorance of the law affords no defence. While a mistake of fact may excuse impugned conduct, a mistake or ignorance of the law will not.

That ignorance of the law affords no defence to provincial offences prosecuted under the POA is made explicit in s. 81, which provides:

81. Ignorance of the law by a person who commits an offence is not an excuse for committing the offence.

In effect, every one is presumed to know the law. It is patent that this presumption is false. However, there are strong social policy reasons justifying the presumption, chief amongst them being ignorance of the law would be encouraged absent the presumption.⁷⁶⁹ While it may be considered undesirable to punish someone for violating a law of which he or she is unaware, it is considered that the public interest in a safe and orderly society is best advanced by sacrificing the individual to the general good. The policy reasons underlying the principle were summarized by Professor Don Stuart as follows.⁷⁷⁰

- Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.
- It would encourage ignorance where knowledge is socially desirable.
- Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.
- Ignorance of the law is blameworthy in itself.

One limited exception to the presumption is non-publication of a regulation.⁷⁷¹

Pursuant to section 5(3) of the *Regulations Act*,⁷⁷² a regulation that is not published is not effective against a person who has not had actual notice of it.

769 O.W. Holmes, "The Common Law" in D. Stuart, *Learning Canadian Criminal Law*, 5th ed. (Scarborough: Carswell, 1995) at 595.

770 D. Stuart, *Canadian Criminal Law: A Treatise*, 3d ed. (Scarborough: Carswell, 1995) at 295-298; *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 at 102, per Lamer C.J.C. (S.C.C.).

771 *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 at 102, per Lamer C.J.C. (S.C.C.).

772 R.S.O. 1990, c. R.21. Section 5 of the *Regulations Act* provides: 5. (1) Every regulation shall be published in *The Ontario Gazette* within one month of its filing. (2) The Minister may at any time by order extend the time for publication of a regulation and the order shall be published with the regulation. (3) A regulation that is not published is not effective against a person who has not had actual notice of it.

Thus, proof that the defendant had no notice of the offence-creating regulation and that the regulation had not been published in the *Ontario Gazette* at the time the defendant was charged provides a complete defence. The rationale underlying the exception is that a conviction in these circumstances would be “manifestly unjust.”⁷⁷³

4.13.5 Officially Induced Error

The defence of officially induced error is another exception to the principle that ignorance of the law is no excuse. Where available, the defence of officially induced error operates to excuse the impugned conduct. The defence has been applied in a number of decisions.⁷⁷⁴ The exception is based upon an acknowledgment of the complexity of contemporary regulatory regimes. Given the often intricate or obscure nature of provincial regulation, the presumption that all citizens have a comprehensive knowledge of the law may be unreasonable.⁷⁷⁵ In this environment, an individual who has sought the advice of an official responsible for the administration of a regulatory regime, and subsequently places reasonable reliance upon the advice given, does not deserve to be punished.

The defence of officially induced error was recognized in the context of regulatory offences by the Ontario Court of Appeal in *R. v. Cancoil Thermal Corp.*:

The defence of “officially induced error” is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.⁷⁷⁶

⁷⁷³ *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 at 102-103, per Lamer C.J.C. (S.C.C.)

⁷⁷⁴ *R. v. MacLean* (1974), 17 C.C.C. (2d) 84 (N.S. Co. Ct.); *R. v. MacDougall* (1981), 60 C.C.C. (2d) 137 (N.S. C.A.); *R. v. Ross* (1985), 14 W.C.B. 437 (Sask. Prov. Ct.); *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.); *R. v. Provincial Foods Inc.* (1992), 15 W.C.B. (2d) 227 (N.S. Co. Ct.); *R. v. Dubeau* (1993), 80 C.C.C. (3d) 54 (Ont. Ct. (Gen. Div.)).

⁷⁷⁵ *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 at 113, per Lamer C.J.C. (S.C.C.).

⁷⁷⁶ *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 at 303 (Ont. C.A.).

It is clear from the decision in *R. v. Cancoil Thermal Corp.* that the onus of proving the defence lies upon the defendant, on a balance of probabilities.⁷⁷⁷

4.13.6 De Minimis Non Curat Lex

De minimis non curat lex, translated literally, means “the law does not concern itself with trifles.” The defence permits a trial justice to dismiss the charge against a defendant whose conduct, while amounting to a technical breach of the statute, is so insignificant that imposition of a penalty would be unduly harsh and contrary to the public interest.

There is some support for the position that the defence of *de minimis* is not available for criminal offences,⁷⁷⁸ and by extension, regulatory offences. However, the better position appears to be that the defence is available for criminal offences.⁷⁷⁹

The *de minimis* defence does apply to provincial offences prosecuted under the POA. This is clear from *R. v. Webster*.⁷⁸⁰ In determining whether the defence applies, the key issue is whether the legislature or the municipality, in creating the offence, could ever have intended so minor a violation to be punishable.⁷⁸¹

Factors relevant to the inquiry include whether punishing the defendant would further the aims of the legislation, whether the legislature would have intended that the defendant's conduct, while a technical breach of the legislation, should be caught by the legislation, and whether convicting and punishing the defendant for the offence would expose the administration of justice to ridicule and contempt.⁷⁸²

777 *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 at 304 (Ont. C.A.); *R. v. British Columbia Hydro and Power Authority*, [1997] B.C.J. No. 1744 (S.C.) (Q.L.).

778 *R. v. Li* (1984), 16 C.C.C. (3d) 382 (Ont. H.C.); *R. v. Chessa*, [1983] B.C.J. No. 1201 (C.A.) (Q.L.).

779 *R. v. Jacobson* (1972), 9 C.C.C. (2d) 59 (Ont. C.A.). See also the *obiter* comments of L'Heureux-Dube J. in *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 at 380-381 (S.C.C.), and Cory J. in *R. v. Cuernier* (1998), 127 C.C.C. (3d) 1 at 19 (S.C.C.).

780 *R. v. Webster* (1981), 10 M.V.R. 310 (Ont. Dist. Ct.).

781 S. Hutchison, D.S. Rose and P. Downes, *The Law of Traffic Offences*, 2d ed. (Scarborough: Carswell, 1998) at 179.

782 *R. v. Webster* (1981), 10 M.V.R. 310 (Ont. Dist. Ct.).

Chapter Five

SENTENCING

5. SENTENCING

5.1 Introduction

After a conviction is entered against a defendant in proceedings commenced under Part I of the *POA*, the trial justice will hear submissions from both the prosecutor and defendant, and then impose sentence.⁷⁸³ As noted in *R. v. Gardiner*, sentencing is the critical stage of the justice system. Given that the majority of defendants plead guilty, sentencing is the most significant decision that the justice system must make.⁷⁸⁴

The imposition of sentence is an exercise of judicial discretion. The fundamental purpose of any sentence is the protection of society.⁷⁸⁵ While achieving this purpose, the sentencing justice must strike an appropriate balance between the competing objectives of sentencing which include deterrence, both specific and general, rehabilitation, retribution and denunciation. The extent to which the sentence imposed reflects a particular objective of sentencing will depend upon the circumstances of the individual case.

5.2 The Nature of Regulatory Offences

The nature of regulatory offences must be considered when determining which principles and factors to apply to impose a sentence in proceedings commenced under Part I of the *POA*.

Regulatory offences, although quasi-criminal in nature, are the government's means of regulating socially desirable conduct. The aim of a regulatory regime is not to punish morally reprehensible conduct. Rather, penalties imposed for violations of regulatory statutes have the utilitarian purpose of preventing future harm to others.

The nature of regulatory offences was discussed in *Wholesale Travel Group Inc. v. R.* by Cory J., who wrote a separate concurring judgment:

It has always been thought that there is a rational basis for distinguishing between

⁷⁸³ See subsection 30 (3), *POA* which provides that the justice presiding at trial will impose sentence unless he or she dies or, in the opinion of the Chief Justice of the Ontario Court of Justice, the presiding justice is "for any other reason unable to continue".

⁷⁸⁴ *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 513-514 (S.C.C.).

⁷⁸⁵ *R. v. Wilmott* (1967) 1 C.C.C. 171 at 177 (Ont. C.A.); *R. v. Wallace* (1973), 11 C.C.C. (2d) 95 at 100 (Ont. C.A.).

crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. *While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.* [emphasis added]

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.⁷⁸⁶

Thus, the rationale underlying any regulatory regime is the establishment and promotion of safe practices for the orderly functioning of society.

5.3 The Objectives of Sentencing

5.3.1 Deterrence

Deterrence, as an objective of sentencing, has a prospective focus. The aim is to impose a sentence which deters the individual offender (specific deterrence) or other members of

⁷⁸⁶ *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 237-238 (S.C.C.). See also *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 357 and 362-363 (S.C.C.).

society (general deterrence) from committing future offences. Given that the primary rationale for any regulatory regime is the prevention of future harm, deterrence is the paramount objective of sentencing in the regulatory context.⁷⁸⁷

a. Specific Deterrence

The objective of specific deterrence is to teach the particular defendant a lesson in order to prevent or deter him or her from repeating the offence.⁷⁸⁸ The penalty imposed should be sufficient to make the defendant fear re-offending, or to reinforce that committing the offence is not worth the resulting sanction.⁷⁸⁹

The need for a sentence that reflects the objective of specific deterrence in a particular case requires a consideration of the circumstances of the specific defendant. Regard must be made to the background of the defendant, his or her previous record and attitude, and prospects for rehabilitation or reformation.⁷⁹⁰

b. General Deterrence

The rationale for general deterrence as an objective of sentencing is that the example of punishment for an offence discourages others from committing the same offence.⁷⁹¹ The underlying premise is that fear of punishment is a powerful modifier of human behaviour.⁷⁹² Knowledge that punishment consistently follows the commission of an offence induces members of society to avoid committing the proscribed conduct.

To determine whether there is a need to impose a sentence that will deter others from committing the same offence, the court may consider the gravity of the offence, the prevalence of the crime in the community,⁷⁹³ the harm caused by the offence, either to the individual defendant or the community, and the general attitude of the public towards the offence.⁷⁹⁴

It is apparent that the objectives of specific and general deterrence can easily come into conflict. To satisfy the objective of general deterrence, defendants aren't punished for their own conduct *per se*, but so that other members of society might be influenced by the

787 *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 at 294 (Ont. C.A.).

788 C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 9.

789 *R. v. Willaert* (1953), 105 C.C.C. 172 at 174-75 (Ont. C.A.).

790 *R. v. Morissette* (1970), 1 C.C.C. (2d) 307 at 310, (Sask. C.A.) leave to appeal ref'd (1970) 1 C.C.C. (2d) 299 (S.C.C.).

791 *R. v. Willaert* (1953), 105 C.C.C. 172 at 174-75 (Ont. C.A.).

792 C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 6.

793 *R. v. Sears* (1978), 39 C.C.C. (2d) 199 at 200 (Ont. C.A.).

794 *R. v. Morissette* (1970), 1 C.C.C. (2d) 307 at 310 (Sask. C.A.), leave to appeal ref'd (1970) 1 C.C.C. (2d) 299.

example of punishment. Conversely, the focus of specific deterrence is upon the individual defendant. The fundamental principle of sentencing is that any sentence imposed must be tailored to the circumstances of the particular defendant and the particular case.⁷⁹⁵ The sentence imposed must be proportional to the gravity of the offence and the moral culpability of the defendant.⁷⁹⁶ Accordingly, it is reversible error to place undue emphasis upon the objective of general deterrence in imposing sentence.⁷⁹⁷

5.3.2 Rehabilitation and Reformation

Rehabilitation and reformation of the defendant, while secondary to the objective of deterrence, are important considerations affecting the determination of a fit sentence.⁷⁹⁸

If the paramount goal of a regulatory regime is to prevent future harm to members of society, an effective means of achieving this goal is to help and encourage those convicted of an offence to modify aberrant behaviour. Thus, it is considered to be in the best interests of society to reclaim wayward members of society through the exercise of sentencing options that encourage reformation and rehabilitation of defendants.⁷⁹⁹

Rehabilitation of the defendant has more weight in cases involving first offenders, youthful offenders, defendants with short or minor records, and relatively less serious offences.⁸⁰⁰ Conversely, rehabilitation of the defendant is given less weight where the defendant has a substantial previous record.⁸⁰¹

5.3.3 Retribution and Denunciation

Both retribution and denunciation are valid objectives of sentencing. However, for reasons that follow, both retribution and denunciation apply with less force than the competing objectives of deterrence and rehabilitation in the regulatory offence context.

795 *R. v. Sears* (1978), 39 C.C.C. (2d) 199 at 200 (Ont. C.A.); See also Section 5.4.1 of the Handbook.

796 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 375 (S.C.C.). See also section 718.1 of the *Criminal Code*.

797 *R. v. McKimm*, [1970] 1 C.C.C. 340 at 341 (Ont. C.A.).

798 *R. v. Morin* (1995), 101 C.C.C. (3d) 124 at 138 (Sask. C.A.); *R. v. Morrisette* (1970), 1 C.C.C. (2d) 307 (at 309 Sask. C.A.); C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 16-17.

799 *R. v. Wallace* (1973), 11 C.C.C. (2d) 95 at 100 (Ont. C.A.).

800 *R. v. Morin* (1995), 101 C.C.C. (3d) 124 at 140 (Sask. C.A.).

801 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 367-368 (S.C.C.).

Retribution, as an objective of sentencing, seeks to punish the moral culpability or blameworthiness of an offender. The nature of retribution as an objective of sentencing was discussed by Lamer C.J.C., speaking for the court, in *R. v. M.(C.A.)*:

Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.⁸⁰²

Lamer C.J.C. also discussed the objective of denunciation in *R. v. M.(C.A.)*. The rationale underlying denunciation is to demonstrate society's "abhorrence" for particular offences:

Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.⁸⁰³

Recall that the focus of a regulatory regime is prospective, not retrospective. The focus is upon the prevention of future harm, rather than the punishment or condemnation of past, morally culpable conduct.⁸⁰⁴ Accordingly, retribution and denunciation, while valid objectives of sentencing in the criminal offence context, have limited application to the sentencing of defendants convicted of provincial offences.

Furthermore, imposition of a sentence based upon the moral culpability of the defendant is inconsistent with the fault requirement for the majority of regulatory or public welfare offences. Regulatory offences, unlike criminal offences, are not subject to a presumption

802 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 368 (S.C.C.).

803 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 369 (S.C.C.).

804 *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 237-238 (S.C.C.).

of full *mens rea*.⁸⁰⁵ Rather, the overwhelming majority of regulatory offences are strict liability or absolute liability offences. For strict liability offences, proof of the prohibited act constitutes *prima facie* proof of the offence, subject to the defendant proving that he or she took all reasonable care in the circumstances, while for absolute liability offences, it is not open to the defendant to exculpate him or herself by establishing that he or she was free of fault. Imposition of a sentence that reflects the moral blameworthiness of an offender is incongruous with the nature of an offence for which the moral fault of the defendant plays a small or no role in the determination of guilt.

5.4 The Principles of Sentencing

5.4.1 Proportionality

The fundamental duty of a sentencing justice is to consider all the legitimate principles of sentencing “to determine a ‘just and appropriate’ sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.”⁸⁰⁶ Any sentence imposed must reflect the circumstances of the particular defendant and the particular offence.⁸⁰⁷

Accordingly, in imposing sentence, the sentencing justice must have regard to the aggravating or mitigating circumstances in the particular case. An aggravating circumstance is a factor which, if present, tends to support the imposition of a higher penalty. In contrast, a mitigating circumstance makes the imposition of a reduced penalty more likely. The sentencing justice will consider the circumstances underlying the offence and the circumstances of the specific defendant, while having regard to the applicable principles of sentencing.

a. Defendant's Ability to Pay Any Fine Imposed

Any fine imposed should be within the defendant's ability to pay,⁸⁰⁸ and should not be of such a magnitude that, given the means of the defendant, it can not be paid within a reasonable amount of time.⁸⁰⁹ Given that penalties in Part I proceedings are limited to

805 *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 373-374 (S.C.C.).

806 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 370 (S.C.C.). See also section 718.1 of the *Criminal Code*.

807 *R. v. Sears* (1978), 39 C.C.C. (2d) 199 at 200 (Ont. C.A.); *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 374-375 (S.C.C.); *R. v. Priest* (1996), 110 C.C.C. (3d) 289 at 297-298 (Ont. C.A.).

808 *R. v. Snider* (1977), 37 C.C.C. (2d) 189 (Ont. C.A.).

809 *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.).

the imposition of a fine, the defendant's ability to pay any fine imposed is the factor given the greatest weight in determining a fit sentence in proceedings under that part.

Subsection 59(2) *POA* reflects the significance of the defendant's ability to pay any fine imposed. Pursuant to subsection 59(2), a sentencing justice may impose a fine below the legislated minimum fine for an offence, or suspend sentence, where imposition of the minimum fine would be "unduly oppressive."⁸¹⁰

Subsection 69(14) of the *POA* allows a justice to issue a warrant to commit a defendant to jail where a fine is in default as long as he or she is satisfied that the defendant is able to pay.

Where a justice is satisfied the defendant is unable to pay the fine, subsection 69(15) of the *POA* allows the justice to grant the defendant relief from the fine by extension of time, reduction of amount or elimination of the fine.

However, it must be noted that subsections 69(6)-(21) will not apply where a municipality is performing *POA* functions under a Part X agreement.⁸¹¹ Therefore where a Part X agreement is in place the defendant cannot be jailed for defaulted fines, nor can he apply for relief under subsection 69(15).

b. Nature and Gravity of the Offence

The consequences of the defendant's misconduct may be considered in determining a fit sentence. For example, in *R. v. Martinez*, an appeal from conviction and sentence for careless driving, it was appropriate for the sentencing justice to consider as an aggravating circumstance the fact that the defendant's conduct resulted in an accident and caused the death of another motorist.⁸¹²

However, the overarching principle guiding a sentencing justice is to impose a sentence which fits the circumstances of the particular defendant and offence. Accordingly, "[w]hile the enormity of the tragic consequences of an offence is a factor to be taken into consideration, it must not be permitted unduly to distort the consideration of the Court as to the appropriate sentence for the offence committed."⁸¹³

⁸¹⁰ Subsection 59(2), *POA*. See also Section 5.6.2 of the Handbook.

⁸¹¹ See section 165 (3) *POA*.

⁸¹² *R. v. Martinez* (1996), 21 M.V.R. (3d) 106 (Ont. C.A.). See also *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 368 (S.C.C.), where Lamer C.J.C. noted that in fulfilling the objective of retribution, it is appropriate to consider the "intentional risk-taking of the offender", and "the consequential harm caused by the offender".

⁸¹³ *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 at 486 (Alta. C.A.). See also *R. v. Couture* (1984), 29 M.V.R. 9 (Ont. C.A.) per Howland C.J.O.

c. Age of the Defendant

In general, youth is considered to be a mitigating factor.⁸¹⁴ The term "youthful offender" refers not only to the defendant's chronological age, but may also involve a consideration of the defendant's maturity level.⁸¹⁵ Restraint, specific deterrence and rehabilitation are the paramount objectives to be addressed with a youthful first offender. The objective of general deterrence is not a primary concern. There is an appreciation that the commission of an offence by a youthful offender is more likely to be a product of an error in judgment rather than a repeated pattern of conduct, and accordingly there is a greater likelihood for reform. However, in cases where there are extreme aggravating factors such as lack of remorse, or contempt for the law, youth may not be enough to warrant leniency.

It should be noted that proceedings against 'young persons' as defined in the *POA* have been excluded from the functions transferred to municipalities under a Part X agreement.

Section 93 *POA* defines a 'young person' as a person who is, or, in the absence of evidence to the contrary, appears to be:

- twelve years of age or more, but under sixteen years of age, and
- includes a person sixteen years of age or more charged with having committed an offence while he or she was twelve years of age or more but under sixteen years of age.

In jurisdictions where the prosecution of provincial offences has been transferred to municipalities, responsibility for the prosecution of those matters will be retained by the province.

Additionally, old age and poor health may be mitigating factors on sentence, particularly where the defendant has little or no prior record of offence.

d. Previous Record of Offence

The defendant's previous record of offence may also be considered. The rationale underlying the use of the defendant's previous record was articulated in *R. v. Morin*: "past conduct is usually the best predictor of future conduct, and a person's [record of offence]

814 *R. v. Quesnel and Smith* (1984), 14 C.C.C. (3d) 254 at 255 (Ont. C.A.); *R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Samaras* (1971), 16 C.R.N.S. 1 (Ont. C.A.).

815 *R. v. Priest* (1996), 110 C.C.C. (3d) 289 at 294-296 (Ont. C.A.); *R. v. Stein* (1974), 15 C.C.C. (2d) 376 (Ont. C.A.); *R. v. Vandale* (1974), 21 C.C.C. (2d) 250 at 251-252 (Ont. C.A.); C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 168; *R. v. Quesnel and Smith* (1984), 14 C.C.C. (3d) 254 at 255 (Ont. C.A.).

is thus one of the best and most accurate measures available to a sentencing judge of the character of that person and, most importantly, the best indicator of whether he or she is likely to offend again."⁸¹⁶ The presence or absence of a prior record indicates whether specific deterrence is a concern with the particular defendant; does the defendant's record suggest that he or she represents a future danger?

A record of previous offence is an aggravating factor. It discloses a pattern of disrespect for the regulatory regime, and indicates that strict enforcement of the minimum fine is necessary to bring home to the defendant the need to refrain from committing further offences. A stiff penalty is warranted in cases where a defendant has demonstrated that he or she continues to commit similar offences, despite past experience,⁸¹⁷ or despite having been treated favourably by the courts in the past.⁸¹⁸

Note that, notwithstanding an extensive prior record, if the defendant has not committed any offences for an extended period of time prior to committing the offence before the court, the court may consider this in imposing sentence.⁸¹⁹

Additionally, circumstances that indicate disrespect for the justice system, such as the commission of a driving offence while under a licence suspension, are aggravating factors.⁸²⁰ Similarly, a sentencing justice may consider as an aggravating factor the defendant's failure to pay fines imposed for previous offences.⁸²¹

e. Defendant's Background and Work Record

The background of the defendant should be considered.⁸²² In general, a good background or work record is a mitigating factor. It is thought that a good background indicates that commission of the offence is out of character, and consequently the need for a sentence reflecting the objectives of specific deterrence and rehabilitation is low.⁸²³ Evidence of a good background or work record includes a stable employment history, community or church involvement, charitable work, family ties and responsibilities, and attendance in school.

⁸¹⁶ *R. v. Morin* (1995), 101 C.C.C. (3d) 124 at 140 (Sask. C.A.).

⁸¹⁷ *R. v. Konkolus* (1988), 6 M.V.R. (2d) 220 (Alta. C.A.).

⁸¹⁸ *R. v. Overdiek* (1982), 8 W.C.B. 464 (B.C. C.A.).

⁸¹⁹ *R. v. Harrell* (1973), 12 C.C.C. (2d) 480 at 482 (Ont. C.A.).

⁸²⁰ *R. v. Richardson* (1992), 74 C.C.C. (3d) 15 at 24 (Ont. C.A.).

⁸²¹ *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 at 483 (Alta. C.A.).

⁸²² *R. v. Samaras* (1971), 16 C.R.N.S. 1 (Ont. C.A.).

⁸²³ See *R. v. Smith* (1974), O.J. No. 221 (Ont. C.A.) (Q.L.).

f. Attitude of the Defendant and Remorse

The justice may also consider the defendant's attitude during the course of the trial and while making submissions on the sentence hearing.

A demonstration of remorse may be cited as a mitigating factor justifying a reduction in the sentence that would otherwise be imposed.⁸²⁴ In contrast, it is an error in principle to consider lack of remorse as an aggravating factor in support of a higher sentence, unless the defendant's attitude towards the offence discloses a "substantial likelihood" of future dangerousness.⁸²⁵ A lack of remorse, however, may legitimately be relied upon to deny the defendant leniency where leniency might otherwise have been warranted.⁸²⁶

Cooperation with authorities may be cited as a mitigating factor.⁸²⁷ In general, cooperation is considered to be indicative of remorse. However, lack of cooperation with a police officer should not be cited as an aggravating factor.⁸²⁸ To do so would be inconsistent with the defendant's right to silence.

g. Guilty Plea

In general, a guilty plea is a mitigating circumstance. A guilty plea indicates that the defendant is remorseful, and saves the community the expense of a trial.⁸²⁹

It may be argued that a guilty plea should not be accorded significant weight where the defendant knows that he or she is "inescapably caught."⁸³⁰ This argument could be advanced in the case of the defendant who plays "traffic court lottery" *i.e.* the defendant who files a notice of intention to appear, but on the trial date pleads guilty upon seeing that the provincial offences officer and other witnesses are present, and that the prosecutor is ready to proceed. However, it should be noted that in other cases the court has rejected the proposition that there should be less weight to a plea of guilty from a person who has been inescapably caught.⁸³¹

The fact that the defendant has presented a defence can not be considered a factor in

824 *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 at 208 (Alta. C.A.); *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.).

825 *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.).

826 *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 at 208-210 (Alta. C.A.); *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.).

827 *R. v. Campbell* (1977), 18 N.S.R. (2d) 547 at 553 (N.S. C.A.); Ontario, Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* G.A. Martin Chair (Toronto: Queen's Printer, 1993) at 285.

828 *R. v. Campbell* (1977), 18 N.S.R. (2d) 547 at 553 (N.S. C.A.).

829 *R. v. Johnston*, [1970] 4 C.C.C. 64 at 67 (Ont. C.A.); *R. v. Layte* (1983), 38 C.R. (3d) 204 at 206-207 (Ont. Co. Ct.).

830 *R. v. Spiller*, [1969] 4 C.C.C. 211 at 215 (B.C.C.A.); *R. v. Wisniewski* (1975), 29 C.R.N.S. 342 at 349 (Ont. Co. Ct.).

831 *R. v. Santos* (1993), 67 O.A.C. at 270 (Ont. C.A.).

aggravation of sentence.⁸³² Increasing the sentence imposed because the defendant has exercised his or her right to a trial would undermine the right to make full answer and defence.⁸³³ Accordingly, even where a defendant commits misconduct in his or her defence, it can not be cited as an aggravating factor.⁸³⁴ At its highest, misconduct in the presentation of a defence may be cited as an indication of lack of remorse, disentitling the defendant to any leniency and reducing the weight attached to any other mitigating circumstances present in the case.⁸³⁵

h. Prevalence of the Offence in the Community

It is appropriate for a sentencing justice to consider circumstances unique to the local community in imposing sentence.⁸³⁶ Given that regulatory offences are a means of promoting safe conditions for other members of society, strict enforcement of penalties for offences frequently committed within a community may be legitimately employed as a means of deterring the commission of a high volume offence.⁸³⁷ Implicit in this factor is the theory of general deterrence: the example of consistent and strict punishment for the commission of an offence deters members of society from committing the proscribed conduct.

As noted above, however, a fit sentence is one that reflects the circumstance of the particular offence and particular offender.⁸³⁸ Accordingly, it is an error in principle to place undue emphasis upon the prevalence of an offence in a community and the principle of general deterrence during a sentencing hearing.⁸³⁹

i. Aggravating and Mitigating Circumstances in the Driving Offences Context

The following is a list of possible aggravating factors in the context of driving offences:⁸⁴⁰

- consumption of alcohol or drugs;
- racing, grossly excessive speed, or showing off;
- disregarding the warnings of passengers;

832 *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 at 208-210 (Alta. C.A.); *R. v. Kozy* (1990), 58 C.C.C. (3d) 500 at 505-506 (Ont. C.A.).

833 *R. v. Kozy* (1990), 58 C.C.C. (3d) 500 at 505-506 (Ont. C.A.); *R. v. Nastos* (1995), 95 C.C.C. (3d) 121 at 126 (Ont. C.A.).

834 *R. v. Nastos* (1995), 95 C.C.C. (3d) 121 at 126 (Ont. C.A.).

835 *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 at 208-210 (Alta. C.A.); *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.).

836 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 375 (S.C.C.).

837 *R. v. Sears* (1978), 39 C.C.C. (2d) 199 at 200 (Ont. C.A.); *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 375 (S.C.C.).

838 *R. v. Sears* (1978), 39 C.C.C. (2d) 199 at 200 (Ont. C.A.); *R. v. Pnest* (1996), 110 C.C.C. (3d) 289 at 293-294 (Ont. C.A.).

839 *R. v. McKimm*, [1970] 1 C.C.C. 340 (Ont. C.A.).

840 *R. v. Boswell* (1984), 3 All E.R. 353 (C.A.); *R. v. Konkolus* (1988), 6 M.V.R. (2d) 220 (Alta. C.A.).

- prolonged, persistent and deliberate course of bad driving;
- simultaneous commission of other offences *e.g.* driving while suspended;
- previous convictions for similar offences;
- serious injury or death; and
- flight from authorities or leaving the scene.

Mitigating factors in the context of driving offences include:

- momentary error of judgment;
- briefly dozing off at the wheel or momentary inattention;
- good driving record;
- good character;
- guilty plea; and
- remorse or genuine shock.

The weight given to any of these factors, of course, depends upon the circumstances of the particular case.

5.4.2 Disparity

Disparity between sentences should be kept to a minimum. Sentencing justices have a duty to ensure that similar sentences are imposed on similar offenders for similar offences in similar circumstances.⁸⁴¹

It is apparent, however, that the disparity principle directly competes with the fundamental principle that any sentence imposed be proportional to the circumstances of the particular offence and particular defendant.

⁸⁴¹ See subsection 718.2(b) of the *Criminal Code*.

The following passage from *R. v. M.(C.A.)* illustrates the tension between the two principles:

Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada [citations omitted]. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime: see *Mellstrom*, *Morrisette* and *Baldhead*. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.⁸⁴²

Ensuring the uniformity of sentences imposed is secondary to the paramount principle that any sentence imposed reflects the circumstances of the particular offence and particular defendant.

5.4.3 Totality

Recall that the basic principle of sentencing is that the quantum of sentence imposed should be commensurate with the gravity of the offence committed and the moral blameworthiness of the defendant.⁸⁴³ Another principle of sentencing is the totality principle. The totality principle is this: upon conviction for multiple offences, the aggregate sentence imposed should not exceed the overall culpability of the defendant.⁸⁴⁴

The following example illustrates the friction between the preceding principles. Mrs. A is waiting in the left hand-turn lane to make a turn at an intersection. There are two vehicles also waiting in front of her vehicle. She has a single 15-year old passenger who is not wearing his seatbelt. As the light turns amber, the two vehicles in front of her vehicle complete a left turn. She enters the intersection against an amber light and completes a

⁸⁴² *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 375 (S.C.C.).

⁸⁴³ *Reference Re. Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 23 C.C.C. (3d) 289 at 325 per Wilson J (S.C.C.); *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 348 (S.C.C.).

⁸⁴⁴ *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 349 (S.C.C.).

left-hand turn, exiting the intersection in the curb lane. A police officer positioned nearby observes the entire transaction and pulls Mrs. A over. When asked to produce her driver's licence, Mrs. A is unable to do so because she left her licence in her other purse.

As a result of this single transaction, Mrs. A is served with four offence notices, one each for: Amber light - fail to stop s. 144(15) *HTA*; Improper left turn s. 141(6) *HTA*; Driver - fail to ensure passenger securely fasten complete seat belt assembly s. 106(6) *HTA*; and Driver - fail to surrender licence s. 33(1) *HTA*. After trial, Mrs. A is convicted of all four offences.⁸⁴⁵

It is now time for sentencing. If the set fine for each offence is imposed, the total fines payable will exceed \$400.00. It is arguable that a total fine payable of this magnitude would be contrary to the principle that the quantum of sentence imposed should be proportional to the gravity of the offence committed and the moral blameworthiness of the defendant.

This conflict is resolved by the totality principle. A justice sentencing a defendant for multiple offences should ensure that the total fine imposed does not exceed the overall culpability of the defendant.⁸⁴⁶ The rationale underlying the totality principle is ensuring that the aggregate sentence imposed is just and appropriate in the circumstances.⁸⁴⁷ Accordingly, where a defendant is convicted of multiple offences following a trial, a sentencing justice may adjust the total fines payable to reflect the overall culpability of the defendant.⁸⁴⁸ Note, however, that the justice may have to lower each individual fine to reduce the aggregate amount in accordance with the totality principle as there is no authority to impose concurrent fines.⁸⁴⁹

845 Note that where the defendant is charged with multiple offences, the prosecutor may withdraw some of the charges in exchange for a guilty plea to the remaining charge or charges. Furthermore, the facts relevant to the withdrawn charges may be considered by the court in imposing sentence. See *R. v. Garcia and Silva*, [1970] 3 C.C.C. 124 at 126 (Ont. C.A.), and Section 5.5.2 of the Handbook, "Guilty Plea" below.

846 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 349 (S.C.C.).

847 C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 44-45.

848 See also C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 296.

849 *R. v. Ward* (1980), 56 C.C.C. (2d) 15 at 18 (Ont. C.A.).

5.5 The Sentencing Hearing

5.5.1 Submissions

Following conviction, the justice will entertain submissions from both the prosecutor and the defendant regarding sentence. Section 57 of the *POA* provides:

57.(1) Submissions as to sentence – Where a defendant who appears is convicted of an offence, the court shall give the prosecutor and the counsel or agent for the defendant an opportunity to make submissions as to sentence and, where the defendant has no counsel or agent, the court shall ask the defendant if he or she has anything to say before sentence is passed.

(2) Omission to comply – The omission to comply with subsection (1) does not affect the validity of the proceeding.

(3) Inquiries by court – Where a defendant is convicted of an offence, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including the defendant's economic circumstances, but the defendant shall not be compelled to answer.

Upon conviction, both the prosecutor and the defendant are entitled to make submissions as to sentence. In the case of an unrepresented defendant, subsection 57(1) places a duty upon the justice to ask the defendant whether he or she has any submissions to make before sentence is passed.

Subsection 57(2) provides that the failure of the justice to permit either the defendant or the prosecutor to make submissions does not invalidate the proceedings. Given that at common law refusal to permit either party to make submissions regarding sentence may constitute reversible error,⁸⁵⁰ subsection 57(2) is best understood as indicating that a failure to entertain submissions does not *prima facie* invalidate the proceedings.

During the sentencing hearing, the court may make inquiries of the defendant, in particular the ability of the defendant to pay any fine that might be imposed.⁸⁵¹ Given that the sentencing options for a trial justice in Part I proceedings are limited to the imposition of a fine or suspending sentence, the discretion to inquire into the economic circumstances of a defendant is a significant power assisting the proper exercise of sentencing discretion.

850 *R. v. Taillefer* (1978), 42 C.C.C. (2d) 282 (Ont. C.A.).

851 Subsection 57(3), *POA*; *R. v. Snider* (1977), 37 C.C.C. (2d) 189 at 190 (Ont. C.A.); *R. v. Ward* (1980), 56 C.C.C. (2d) 15 at 18 (Ont. C.A.); See also *Czumak v. Etobicoke (City)*, [1994] O.J. No. 2247 [unreported], (Ont. Ct. (Prov. Div.)) (Q.L.).

Indeed, it may be reversible error to impose a fine without conducting an inquiry into the defendant's ability to pay.

Submissions on sentence should address the objectives and principles of sentencing and how they are relevant in the context of the particular case. Accordingly, familiarity with the facts of the particular case, and knowledge of the principles and objectives of sentencing, are both important. The prosecutor should recognize the aggravating and mitigating circumstances present in the case, and be able to articulate why the circumstances of the particular case call for a sentence which reflects the relevant principles and objectives of sentencing.

5.5.2 Guilty Plea

Where a defendant has a trial and is convicted, the sentencing justice will rely on the facts presented at trial.

On a guilty plea, no prior determination of the facts has been made. In determining a fit sentence, the justice will consider those circumstances read onto the record by the prosecutor and admitted by the defendant. This procedure is permissible because the strict rules of evidence do not apply to a sentencing hearing.⁸⁵² At the sentencing stage, the guilt of the defendant has already been established. The focus of the sentencing hearing is the determination of a fit sentence, which is facilitated by full access to all information relevant to the defendant and the offence. Accordingly, hearsay evidence is permissible if it is credible and trustworthy.

The circumstances of the offence related to the court must be consistent with the offence charged.⁸⁵³ The prosecutor is entitled to relate the circumstances of the offence as he or she understands them, subject to the defendant's right to object to any submission.⁸⁵⁴ A guilty plea constitutes an admission of the essential elements of the offence only,⁸⁵⁵ and the defendant may object to consideration of an alleged aggravating factor.

⁸⁵² "Guilty pleas are also discussed in section 4.9 of the Handbook, "Arrest and Plea". *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514 (S.C.C.).

⁸⁵³ *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 at 182-183 (S.C.C.).

⁸⁵⁴ *R. v. Gobin* (1993), 85 C.C.C. (3d) 481 at 482 (Man. C.A.).

⁸⁵⁵ *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514 (S.C.C.); *R. v. Adgey* (1973), 13 C.C.C. (2d) 177 (S.C.C.); *R. v. Desjarlais* (1987), 50 Man. R. (2d) 1 (C.A.).

If an objection is made, it is incumbent upon the prosecutor to prove the existence of the aggravating factor beyond a reasonable doubt.⁸⁵⁶

Although the prosecutor has the onus of proving aggravating factors beyond a reasonable doubt, it does not follow that in the absence of such proof, the facts as alleged by the defendant must be assumed in favour of the defendant.⁸⁵⁷ The better view is that if the prosecutor fails to prove aggravating factors, the court should accept the defendant's version, unless the defendant's version is manifestly contrived or inconsistent with the offence charged.⁸⁵⁸

Proof of an aggravating factor may require the calling of evidence. Similarly, if the defendant wishes to apprise the court of a significant mitigating circumstance, the defendant may call a witness in support. At the sentencing hearing, both parties are entitled to call witnesses, and cross-examine their opponent's witnesses, in addition to making submissions to the court.⁸⁵⁹

Where a defendant is charged with multiple offences, the prosecutor may withdraw one or more of the charges in exchange for a guilty plea to the remaining charges. Where such an agreement is reached, the court may properly consider the facts relevant to the withdrawn charges in imposing sentence for the charges that the defendant has pled guilty to.⁸⁶⁰

5.5.3 Joint Submissions

The prosecutor and the defendant, or his or her agent or counsel, may make a joint submission to the court regarding the facts of the case and/or sentence.⁸⁶¹ A joint submission is an agreement between the prosecutor and the defendant regarding the factual circumstances related to the commission of the offence that will be considered by the court, and/or the appropriate sentence to be imposed.

Joint submissions are encouraged for a number of reasons. First, by resolving and

⁸⁵⁶ *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514 -516 (S.C.C.).

⁸⁵⁷ *R. v. Holt* (1983), 4 C.C.C. (3d) 32 at 52 (Ont. C.A.).

⁸⁵⁸ *R. v. Gobin* (1993), 85 C.C.C. (3d) 481 at 482, 484-485 (Man. C.A.).

⁸⁵⁹ *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 at 514 (S.C.C.).

⁸⁶⁰ *R. v. Garcia and Silva*, [1970] 3 C.C.C. 124 at 126 (Ont. C.A.).

⁸⁶¹ See also subsection 46(4), POA, which provides that "the court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof of evidence"

reducing issues without the need for trial, joint submissions conserve judicial resources.⁸⁶² Second, conserving court resources, and eliminating the need for testimony from witnesses, are "powerful circumstances in mitigation of sentence" which the defendant can benefit from.⁸⁶³ Thus, both the prosecutor and the defendant benefit from a joint submission. Third, a joint submission provides valuable guidance to a sentencing justice, because the parties are more familiar with the circumstances of the case than the justice.⁸⁶⁴ A sentencing justice may safely rely upon an agreement reached between the prosecutor and the defendant as to the appropriate penalty, knowing that such an agreement represents what both parties believe is fair and reasonable in the circumstances.⁸⁶⁵ This final argument carries less weight in the case of an unrepresented defendant.

It is important to recognize, however, that a sentencing justice is not bound by a joint submission.⁸⁶⁶ While a sentencing justice has an obligation to give a joint submission serious consideration, the sentencing justice has an overriding duty to ensure that any sentence imposed is fit in circumstances. Moreover, the sentencing justice is not obliged to permit a defendant to withdraw his or her guilty plea in the event that a joint submission is rejected.⁸⁶⁷ Defendants can not enter a conditional plea of guilty.⁸⁶⁸ Whether a defendant will be allowed to withdraw his or her guilty plea is a matter fully within the discretion of the sentencing justice.⁸⁶⁹ Accordingly, it is good practice to inform an unrepresented defendant on a guilty plea that the justice is not bound by a joint submission, and if the joint submission is rejected, the defendant will not necessarily be permitted to withdraw his or her plea.

862 Ontario, Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions G.A. Martin Chair (Toronto: Queen's Printer, 1993) at 280-286.

863 *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 at 359-360 (Ont. C.A.).

864 *R. v. Wood* (1988), 43 C.C.C. (3d) 570 at 574 (Ont. C.A.); *R. v. Grimsson* (1997), 100 B.C.A.C. 253.

865 Ontario, Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions G.A. Martin Chair (Toronto: Queen's Printer, 1993) at 287-288.

866 *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 at 94 (Ont. C.A.); *R. v. Wood* (1988), 43 C.C.C. (3d) 570 at 574 (Ont. C.A.); *R. v. Grimsson* (1997), 100 B.C.A.C. 253.

867 *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 at 94-95 (Ont. C.A.).

868 *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 at 360 (Ont. C.A.).

869 *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 at 94-95 (Ont. C.A.).

5.5.4 Proof of Previous Convictions

a. Non-HTA Offences

Subsection 57(4) *POA* governs the proof of previous convictions for non-*HTA* offences.

57. (4) Proof of previous conviction – A certificate setting out with reasonable particularity the finding of guilt or acquittal or conviction and sentence in Canada of a person signed by,

(a) the person who made the adjudication; or (b) the clerk of the court where the adjudication was made,

is, upon the court being satisfied that the defendant is the person referred to in the certificate, admissible in evidence and is proof, in the absence of evidence to the contrary, of the facts stated therein without proof of the signature or the official character of the person appearing to have signed the certificate.

Pursuant to subsection 57(4), a certified copy of a previous conviction is *prima facie* proof of the conviction, and may be received by the sentencing justice without the requirement of a notice of intention to produce the certificate being given to the defendant beforehand.⁸⁷⁰ A defendant may challenge the authenticity or accuracy of the certificate however, in the absence of evidence to the contrary, the certificate constitutes conclusive proof of the conviction alleged.⁸⁷¹

b. HTA Offences

Subsections 210(7) and (8) *HTA* govern the proof of previous convictions for *HTA* offences.⁸⁷²

210. (7) Evidence - A copy of any writing, paper or document filed in the Ministry under this Act, or any statement containing information from the records required to be kept under this Act, purporting to be certified by the Registrar under the seal of the Ministry, shall be received in evidence in all courts without proof of the seal or signature and is proof, in the absence of evidence to the contrary, of the facts contained therein.

(8) Signature of the Registrar - An engraved, lithographed, printed or otherwise mechanically or electronically reproduced signature or facsimile signature of the Registrar is sufficient authentication of any such copy or statement.

⁸⁷⁰ *R. v. Trnmban* (1988), 29 O.A.C. 326 at 329; *R. v. Vljakovic* (1994), 5 M.V.R. (3d) 219 at 221 (Ont. C.A.).

⁸⁷¹ *R. v. Vljakovic* (1994), 5 M.V.R. (3d) 219 at 221 (Ont. C.A.); *R. v. Francis* (1996), 22 M.V.R. (3d) 211 (Ont. C.A.).

⁸⁷² *Highway Traffic Act*, R.S.O. (1990) c.H.8.

Pursuant to subsections 210(7) and (8) of the *HTA*, a certified document under the hand and seal of the Registrar of Motor Vehicles shall be received into evidence as proof of the facts alleged in the document. The certified document may be tendered directly by the prosecutor, and in particular, need not be tendered through the official who ordered the documents from the Ministry for the purposes of identification and authentication.⁸⁷³ The certified document constitutes *prima facie* proof of the convictions alleged, and in the absence of evidence to the contrary, is conclusive proof of the facts contained within.⁸⁷⁴

5.6 Available Penalties

5.6.1 Section 12 of the POA

The justice has two options with respect to sentence in Part I proceedings. The justice may impose a fine, or may suspend sentence.⁸⁷⁵ Penalties in Part I proceedings are established by section 12 of the *POA*. Section 12(1) provides:

12. (1) Penalty – Where the penalty prescribed for an offence includes a fine of more than \$500 or imprisonment and a proceeding is commenced under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or \$500, whichever is the lesser.

Penalties in Part I proceedings are limited to a *maximum fine* of \$500.00, notwithstanding any provision in the offence creating statute. Imprisonment is not an available penalty in Part I proceedings. While a justice may suspend the passing of sentence, there is no provision in the *POA* for absolute or conditional discharges.⁸⁷⁶

For defendants convicted of multiple offences, the sentencing justice must impose a separate fine or sentence for each offence. A sentencing justice does not have the jurisdiction to impose concurrent fines.⁸⁷⁷

⁸⁷³ *R. v. Vlajkovic* (1994), 5 M.V.R. (3d) 219 at 222 (Ont. C.A.).

⁸⁷⁴ *R. v. Vlajkovic* (1994), 5 M.V.R. (3d) 219 at 221 (Ont. C.A.); *R. v. Francis* (1996), 22 M.V.R. (3d) 211 (Ont. C.A.).

⁸⁷⁵ Subsection 59(2), *POA*, gives the justice the power to suspend sentence.

⁸⁷⁶ See *R. v. Szluke* (1993), 87 C.C.C. (3d) 50 at 54 (Ont. C.A.).

⁸⁷⁷ *R. v. Ward* (1980), 56 C.C.C. (2d) 15 at 18 (Ont. C.A.).

5.6.2 Discretion to Impose Fine Below Statutory Minimum or Suspend Sentence

Section 59 provides:

59.(1) Provision for minimum penalty – No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

(2) Relief against minimum fine - Although the provision that created the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

Pursuant to subsection 59(2), the sentencing justice has the discretion to impose a fine below the statutorily prescribed minimum fine for an offence, or suspend sentence. The rationale underlying subsection 59(2) is this: it is an error in principle to impose a fine which is beyond the defendant's means to pay.⁸⁷⁸ A sentencing justice is not bound by the set fine established for an offence. Set fines are meant to be persuasive, and the discretion remains with the sentencing justice to impose a suitable penalty having regard to the applicable principles of sentencing.⁸⁷⁹ Accordingly, subsection 59(2) permits a sentencing justice to impose a fine that is fit in the circumstances of the particular case, having regard to the circumstances of the particular defendant and offence before the court. The discretion conferred by subsection 59(2) must be exercised judicially. Before imposing a fine below the statutory minimum or suspending sentence, the justice must conduct an inquiry into the defendant's ability to pay.⁸⁸⁰ The justice's discretion under subsection 59(2) should not be exercised unless the defendant proves, on a balance of probabilities, that there are exceptional circumstances affecting the defendant's life and such that imposition of the minimum fine would be unduly oppressive, or otherwise not in the interests of justice. Note that the discretion to reduce the minimum penalty or suspend sentence is limited to the imposition of fines.

⁸⁷⁸ *R. v. Snider* (1977), 37 C.C.C. (2d) 189 (Ont. C.A.); *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.). See also *Czumak v. Etobicoke (City)*, [1994] O.J. No. 2247 (Ont. Ct. (Prov. Div.)) (Q.L.).

⁸⁷⁹ *R. v. Crawford* (6 August 1996), (Ont. Ct. (Prov. Div.)) [unreported]. See also *R. v. Malik*, [1997] O.J. No. 5910 (Ont. Ct. (Prov. Div.)) (Q.L.); *R. v. Pham*, [1996] O.J. No. 4366 (Ont. Ct. (Prov. Div.)) (Q.L.); *R. v. Emilson*, [1996] O.J. No. 5074 (Ont. Ct. (Prov. Div.)) (Q.L.).

⁸⁸⁰ *R. v. Jansen* (1983), 10 W.C.B. 24 (Ont. Co. Ct.).

In particular, section 59(2) does not confer the jurisdiction to reduce or prevent the automatic licence suspension imposed upon conviction for certain driving offences under the HTA.⁸⁸¹

5.6.3 Discretion to Impose Fine in Excess of Set Fine

If a conviction is entered following a trial, a sentencing justice has the discretion to impose a fine in excess of the set fine for the offence. The maximum fine that may be imposed for an offence prosecuted under Part I is \$500.00.⁸⁸² The set fines established by the Chief Justice for offences are intended to apply to defendants who wish to exercise the out-of-court disposition process provided by Part I of the POA by simply pleading guilty and paying the set fine.⁸⁸³ Once the matter proceeds to trial, the set fine for an offence is only persuasive. It is the duty of a sentencing justice to impose a sentence which is fit in the circumstances. Accordingly, it may be appropriate for a sentencing justice to exercise his or her discretion to impose a fine in excess of the set fine established for an offence, if, having regard to the principles of sentencing, the circumstances of the particular defendant and offence warrant doing so.⁸⁸⁴

881 *R. v. Dilorenzo* (1984), 26 M.V.R. 259 at 274-275 (Ont. C.A.); *R. v. Robertson* (1984), 43 C.R. (3d) 39 at 53-54 (Ont. Prov. Ct.).

882 Subsection 12(1) POA.

883 *R. v. Crawford* (6 August 1996), (Ont. Ct. (Prov. Div.)) [unreported].

884 *R. v. Malik*, [1997] O.J. No. 5910 [unreported], (Ont. Ct. (Prov. Div.)) (Q.L.); *R. v. Pham*, [1996] O.J. No. 4366 [unreported], (Ont. Ct. (Prov. Div.)) (Q.L.); *R. v. Emilson*, [1996] O.J. No. 5074 (Ont. Ct. (Prov. Div.)) (Q.L.).

Chapter Six

APPEALS

6. APPEALS

6.1 Introduction

In this chapter, the provisions of the *POA* and related rules of the Ontario Court of Justice which govern appeals under Part I will be reviewed. These provisions are contained in Part VII of the *POA*, which is titled "Appeals and Review."

Part VII is divided into four areas. The first area, which is untitled, contains general provisions germane to all appeals under the *POA*. These provisions include definitions, procedures related to in custody defendants, the requirement of paying any fine before filing a notice of appeal, and the responsibility of the trial court clerk to transmit materials relevant to the proceedings to the appeal court upon receipt of the notice of appeal.

The second area, "Appeals under Part III," contains provisions that apply to appeals from proceedings commenced under Part III. The third area, "Appeals under Parts I and II," contains provisions applicable to appeals from proceedings commenced by certificate of offence. The separate streams for appeals under Part III and Part I, reflect the relatively minor nature of the matters prosecuted under the latter Part. The provisions for appeals under Part I provide a simplified procedure consistent with the expeditious and informal nature of all proceedings commenced by certificate of offence.

Although this Part of the *Act* establishes separate procedural streams for appeals it is important to note that some of the provisions with respect to Part III appeals will also apply to proceeding under Part I.

The last area, "Review," contains the judicial review provisions of the *POA*.

Further O.Reg. 722/94 "Rules of the Ontario Court of Justice in Appeals Under Section 135 of the *Provincial Offences Act*" must be complied with in respect of appeals under Part I. O.Reg. 721/94 "Rules of the Court of Appeal in Appeals Under the *Provincial Offences Act*" applies to appeals to the Ontario Court of Appeal under s. 139 of the *POA*.

6.2 General Provisions, Part VII POA

6.2.1 Definitions

Section 109 provides:

109. Definitions – In this Part.

“counsel” when used in respect of a proceeding in the Ontario Court of Justice includes an agent: (“avocat”)

“court” means the court to which an appeal is or may be taken under this Part: (“tribunal”)

“justice” means a justice of the court to which an appeal is or may be taken under this Part: (“juge d’appel”)

“sentence” includes any order or disposition consequent upon a conviction and an order as to costs: (“sentence”).

Rule 1 of O.Reg. 722/94, the “Definitions and Interpretation” rule, provides:

Definitions

1. (1) In these rules,

“Act” means the Provincial Offences Act; (“Loi”)

“appeal court” means the Ontario Court of Justice sitting as the appeal court under section 135 of the Act; (“tribunal d’appel”)

“clerk” means the clerk of the Ontario Court of Justice ; (“greffier”)

“file” means file with the clerk (déposer”)

“justice” means justice of the Ontario Court of Justice sitting as the appeal court under section 135 of the Act. (“juge”).

Application of Rules

(2) These rules apply in respect of appeals to the Ontario Court of Justice under section 135 of the Act.

General Principle

(3) These rules shall be construed liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding.

Section 109 is the definition provision for Part VII of the *POA*. Agents are included within the definition of "counsel," and are permitted to appear on behalf of defendants in appeal proceedings before the Ontario Court of Justice. "Court" is defined as the court to which an appeal is or may be taken under Part VII, which is the Ontario Court of Justice for Part I appeals. Further appeals are available to the Court of Appeal for Ontario, with leave of a justice of the Court of Appeal. The "justice" who hears an appeal under Part I must be a justice of the Ontario Court of Justice, or a justice of the Court of Appeal for Ontario, if leave is granted. "Sentence" includes any order or disposition consequent upon a conviction and all orders as to costs.

O.Reg. 722/94 rule 1(3) states the "general principle" underlying the rules. The rules "shall be construed liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding." Rule 1(3) is consistent with the general theme permeating Part I, which is geared towards a just, efficient and expeditious resolution of charges.

6.2.2 In Custody Payments

Section 110 of the *POA* provides:

110. Custody pending appeal – A defendant who appeals shall, if in custody, remain in custody, but a justice may order his or her release upon any of the conditions set out in subsection 150(2).

In custody defendants may appeal conviction or sentence in proceedings commenced under Part I. In the context of an appeal from conviction in Part I proceedings, section 110 would apply where a defendant sentenced to a period of incarceration following conviction for an offence prosecuted under Part III seeks to appeal a conviction for an offence arising out of the same transaction, but proceeded with by way of certificate of offence.

For the reasons that follow, the bail pending appeal provisions of the *POA* do not apply to appeal proceedings conducted by Municipal Prosecutors. First, post-transfer, Municipal Prosecutors will be conducting prosecutions and appeals from Part I proceedings only. Section 12 of the *POA* prohibits imprisonment in relation to proceedings commenced under Part I. Second, pursuant to the Transfer Agreement between the Attorney General and the Municipality, the Attorney General will continue to conduct prosecutions commenced under Part I of the *POA* where a proceeding has also been commenced

under Part III in relation to the same circumstances.⁸⁸⁵ Consequently, section 110 does not have any application to appeals conducted by Municipal Prosecutors.

6.2.3 Payment of Fine Before Appeal

Sections 111 and 114 of the *POA* provide:

111. (1) Payment of fine before appeal – A notice of appeal by a defendant shall not be accepted for filing if the defendant has not paid in full the fine imposed by the decision appealed from.

(2) Exception with recognizance – A justice may waive compliance with subsection (1) and order that the defendant enter into a recognizance to appear on the appeal, and the recognizance shall be in such amount, with or without sureties as the justice directs.

114. Payment of fine not waiver – A person does not waive the right of appeal by reason only that the person pays the fine or complies with any order imposed upon conviction.

Rule 5 provides:

Appeal Where Fine Imposed

5. A defendant who appeals from a decision imposing a fine shall file with the notice of appeal a receipt for payment of the fine issued by the clerk of the court that imposed the fine or state in the notice of appeal that the fine has been paid to a municipality responsible for collecting its own parking fines, unless the clerk is satisfied that an order has been made under subsection 111(2) of the Act and a recognizance has been entered into by the defendant in accordance with the order.

Appeals are commenced by filing a notice of appeal. Section 111(1) provides that a defendant must pay any fine imposed in full before the clerk of the court will accept and file his or her notice of appeal. Pursuant to Rule 5 of Regulation 722/94, a defendant must show the clerk a receipt for payment of the fine, and file the receipt with the notice of appeal. Pursuant to s. 114, payment of the fine does not constitute a waiver of the defendant's right to appeal.

a. Recognizance to Appear on Appeal

Under s. 111(2), a defendant may move before a justice of the appeal court to waive the

⁸⁸⁵ Paragraph 1.5.2 of the Memorandum of Understanding.

requirement that the defendant pay the fine before filing the notice of appeal. This motion may be heard without notice to the prosecutor.⁸⁸⁶ The justice hearing the motion may base his or her decision on affidavit, oral or transcript evidence,⁸⁸⁷ and may also base his or her decision on "information that he or she considers credible or trustworthy in the circumstances."⁸⁸⁸ Rule 11(5) in effect permits the reception of hearsay evidence on the motion.

If the motion is granted, the justice will order the defendant to enter into a recognizance to appear on the appeal. The recognizance will be in an amount, with or without sureties, that the justice directs. In practice, the recognizance will be in an amount equal to the fine imposed upon conviction. The order for recognizance and recognizance are to be in Form 4.⁸⁸⁹ If the defendant presents the clerk of the court with proof that an order under s. 111(2) has been made and a recognizance entered into in accordance with the order, the clerk will accept the notice of appeal for filing without a receipt for payment of any fine imposed.⁸⁹⁰

Whether a defendant pays his or her fine or enters into a recognizance before filing a notice of appeal, it is clear that the purpose behind s. 111 is to discourage frivolous appeals.⁸⁹¹

6.2.4 Stay Pending Appeal

Instead of paying a fine or entering into a recognizance under s. 111 of the POA, the defendant may apply for a stay of fine pending his appeal pursuant to s. 112. Section 112 provides:

112. Stay – The filing of a notice of appeal does not stay the conviction unless a justice so orders.

As with a motion for relief from payment of a fine by entering into a recognizance, a motion for a stay pending appeal does not require notice to the prosecutor.⁸⁹²

Section 112 makes it clear that the filing of a notice of appeal does not, in itself, stay the fine. A motion must be brought for this relief. As noted by Drinkwater and Ewart, the

⁸⁸⁶ O Reg 722/94 Rule 11(6)(b).

⁸⁸⁷ O Reg 722/94 Rule 11(4).

⁸⁸⁸ O Reg 722/94 Rule 11(5).

⁸⁸⁹ O Reg 722/94 Rule 10(2).

⁸⁹⁰ O Reg 722/94 Rule 5.

⁸⁹¹ Drinkwater W.D. and Ewart J.D. *Ontario Provincial Offences Procedure* (Toronto: Carswell 1980) at 294-95.

⁸⁹² O Reg 722/94 Rule 11(6)(b).

purpose of s. 112 is to dissuade frivolous appeals brought to delay the consequences of conviction.⁸⁹³

If the order is granted, the defendant may avoid paying the fine assessed upon conviction until disposition of the appeal. The justice hearing the motion may base his or her decision on affidavit, oral or transcript evidence,⁸⁹⁴ and may also rely on hearsay evidence considered credible and trustworthy in the circumstances.⁸⁹⁵

a. Stay of Fine Pending Appeal

There is a paucity of caselaw defining the test for a stay pending appeal under s. 112 of the POA. Guidance may be sought from cases which have considered the onus on defendants convicted of *Criminal Code* driving offences which carry mandatory or discretionary driving prohibitions who seek a stay of the driving prohibition pending appeal.⁸⁹⁶ A defendant seeking a stay of a driving prohibition pending appeal has the onus of establishing, on a balance of probabilities, that he or she meets the following criteria:

- the appeal is not frivolous;
- enforcing the order appealed from pending the outcome of the appeal is not necessary in the public interest; *and*
- any stay granted would not detrimentally affect the confidence of the public in the effective enforcement and administration of criminal law.⁸⁹⁷

The first requirement, that the appeal not be frivolous, may be met by evidence that the defendant has filed a notice of appeal, and that an arguable point will be raised by the appeal. The defendant does not have to establish that the appeal will likely be successful.

The second and third requirements to be met, are closely related. Maintaining the confidence of the public in the administration of justice may be considered a component of the public interest requirement. Factors relevant to the public interest include likelihood of re-offending, seriousness of the charge, background of the appellant/defendant, and potential danger to the public.⁸⁹⁸ The weight accorded to each factor depends upon the

893 Drinkwater W.D. and Ewart J.D., *Ontario Provincial Offences Procedure* (Toronto: Carswell 1980) at 294-95

894 O.Reg. 722/94 Rule 11(4).

895 O.Reg. 722/94 Rule 11(5).

896 Section 261 CC confers upon a justice of the appeal court the power to stay a driving prohibition order imposed pursuant to section 258(1) or (2) CC.

897 *R. v. Jay* (1987), 50 M.V.R. 137 (P.E.I. S.C.); see also *R. v. Smug*, [1998] O.J. No. 4357 (Ont. C.A.) (Q.L.); *R. v. Drake* (1996), 142 Nfld. & P.E.I.R. 93 (Nfld.S.C. T.D.); *R. v. Hashem* (1992), 41 M.V.R. (2d) 92 (Alta. Q.B.); *R. v. Smith* (1993), 50 M.V.R. (2d) 307 (B.C.C.A.).

898 *R. v. Holloway* (1987), 48 M.V.R. 270 (Ont. Dist. Ct.); *R. v. Jay* (1987), 50 M.V.R. 137 (P.E.I. S.C.).

circumstances of each case. The court will look at the defendant's past record, and the circumstances of the offence appealed from, to determine whether enforcement of the order appealed from is necessary in the public interest.

Where the court is asked to stay the payment of a fine pending an appeal, factors unique to the imposition of a fine will also be considered. In determining whether it is in the public interest to enforce the fine, the merits of the appeal are not the only consideration. The interests of the state, the public's confidence and respect for the courts and administration of justice must also be considered.⁸⁹⁹ In *R. v. Sunoco Inc.*,⁹⁰⁰ the following factors were enumerated:

- Are the grounds of appeal weak or strong?
- Is the fine imposed out of all proportion to others levied for the same offence or is it disproportionate to the facts of the offence?
- Was there merely a technical breach of the statute or was it a flagrant violation?
- How long a period will elapse before the appeal can be heard?
- What is the likely effect of the levying of the fine upon the accused?

As emphasized by the last factor, the ability of the defendant to pay the fine is an important and potentially decisive consideration.⁹⁰¹

b. Demerit Points, Licence Suspensions and Probation Orders

Section 12 of the *POA* sets out the penalties available in Part I proceedings. Specifically, the maximum fine in proceedings commenced by certificate of offence is \$500, and the consequences of conviction under any other *Act* do not apply.⁹⁰² However, subsection 12(2) provides that, notwithstanding subsection 12(1), a defendant convicted of a *HTA* offence listed in the Table to O.Reg. 339/94 "Demerit Point System," will have demerit points entered on his or her driving record, and, may have his or her licence suspended upon conviction.

Probation is not an available penalty in proceedings commenced by certificate of

899 *R. v. CHEK TV Ltd.* (1986), 27 C.C.C. (3d) 380 (B.C. C.A.).

900 *R. v. Sunoco Inc.* (1986), 11 C.P.R. (3d) 572 at 573 (Ont. C.A.).

901 *R. v. Sunoco Inc.* (1986), 11 C.P.R. (3d) 572 (Ont. C.A.).

902 Subsection 12(1) *POA*, Subsection 72(1) *POA*.

offence.⁹⁰³ Accordingly, a defendant in Part I appeal proceedings will not have occasion to seek a stay of a probation order.

While a justice hearing a motion for stay pending appeal may stay the payment of a fine attendant upon conviction, the justice does not have the jurisdiction to stay the imposition of demerit points or a licence suspension pending an appeal.

Demerit points are an administrative penalty automatically imposed by the Registrar of Motor Vehicles upon conviction for certain *HTA* offences.⁹⁰⁴ Consequently, a defendant who wishes to stay the entry of demerit points against his or her driving record pending an appeal must serve a notice of the appeal on the Registrar. Once the Registrar has been served with the notice of appeal, the conviction and corresponding demerit points will not be entered against the defendant's driving record unless the conviction is sustained on appeal.

Like demerit points, a licence suspension is an administrative penalty which may be imposed upon conviction. Subsection 47(1) *HTA* provides that the Registrar of Motor Vehicles may suspend or cancel a driver's licence upon conviction for any offence under the *HTA*.⁹⁰⁵ Pursuant to Section 50 *HTA*, where the Registrar has denied a stay of licence suspension pending an appeal, a stay may only be granted by the Licence Suspension Appeal Board, which may confirm, modify or set aside the decision of the Registrar to suspend the defendant's licence.⁹⁰⁶

c. Impounded Motor Vehicles

As noted above, section 112 *POA* governs the stay of fines imposed upon conviction pending appeal. Pursuant to section 220 *HTA*, a defendant's motor vehicle may be impounded upon conviction for *HTA* offences related to suspended permits or licences.

903 The Table to O.Reg. 339/94 lists the *HTA* offences for which demerit points will be imposed upon conviction.

904 O.Reg. 339/94 s.5(1), which provides: 5. (1) If a person convicted of an offence set out in Column 1 of the Table appeals the conviction and notice of the appeal is served on the Registrar, the conviction and demerit points related to it shall not be entered on the person's record unless the conviction is sustained on appeal. (2) If a conviction referred to in subsection (1) and related demerit points have been recorded prior to service of notice of appeal on the Registrar, the conviction and demerit points shall be removed from the record, and any suspension imposed as a result of conviction shall be stayed, as of the date notice is served on the Registrar, unless the conviction is sustained on appeal.

905 Subsection 47(1)(e) *HTA* provides that the Registrar may suspend a driver's licence upon conviction for any offence referred to in subsection 210(1) *HTA*. Subsection 210(1) *HTA* refers to "a conviction for an offence under this Act [the *HTA*]".

906 Subsection 50(2) *HTA*. Sections 47, 51 and 53 *HTA*: see subsection 220(1) *HTA*. Although this Part of the Act establishes separate procedural streams for appeals it is important to note that some of the provisions with respect to Part III appeals will also apply to proceedings under Part I.

A stay of an impoundment order pending appeal is governed by section 222 HTA, which provides:

222. Impounding of Vehicle on Appeal - If a person to whom section 220 applies enters an appeal against the person's conviction and there is filed with the convicting provincial justice sufficient security for the production of the motor vehicle if the appeal should fail, section 220 does not apply unless the conviction is sustained on appeal.

Pursuant to section 222 HTA, an impoundment order may be stayed pending an appeal of conviction where the defendant files with the convicting justice security in an amount sufficient to ensure production of the motor vehicle subject to the impoundment order should the defendant's appeal be dismissed.

6.2.5 Transmittal of Material Relevant to the Appeal

Section 115 of the POA provides:

115. Transmittal of material – Where a notice of appeal has been filed, the clerk or local register of the appeal court shall notify the clerk of the trial court of the appeal and upon receipt of the notification, the clerk of the trial court shall transmit the order appealed from and transmit or transfer custody of all other materials in his or her possession or control relevant to the proceeding to the clerk or local registrar of the appeal court to be kept with the records of the appeal court.

Section 115 directs the clerk of the appeal court to notify the clerk of the trial court that an appeal has been filed. The clerk of the trial court will then transmit the order appealed from and all documents and materials relevant to the appeal to the clerk of the appeal court. O.Reg 722/94 is silent on the issue of transmittal of documents, but does provide in Rule 1(4) that where a matter is not provided for in the Rules, the practice shall be determined by analogy to the remainder of the Rules. O.Reg 722/94 Rule 1(4) has been interpreted so as to incorporate Rule 11 of O.Reg. 723/94 "Rules of the Superior Court of Justice and the Ontario Court of Justice in Appeals Under Section 116 of the *Provincial Offences Act*," with respect to transmittal of documents under Part I appeals. O.Reg. 723/94 Rule 11(1) provides that the clerk of the appeal court shall send a copy of the notice of appeal to the clerk of the trial court as the notice required under s. 115. Upon receipt of the notice, the clerk of the trial court has 10 days to transmit the order appealed

from and any relevant documents to the appeal court.⁹⁰⁷

6.3 Part I Appeals

6.3.1 Introduction

Sections 135 to 139 of the *POA* govern appeals in proceedings commenced by certificate of offence under Part I. These sections fall under the heading "Appeals Under Parts I and II."

Appeals in Part I proceedings are conducted by means of a review, or a reconsideration of the trial proceedings. The Part I appeal procedure, as opposed to the Part III procedure, is intended to be expeditious and informal, and reflects the relatively minor nature of proceedings commenced under Part I.

Note that the Part I appellate review jurisdiction which includes the power to affirm, reverse or vary the decision appealed from and some cases, direct a new trial,⁹⁰⁸ is different from the jurisdiction exercised by a justice determining an application for a prerogative remedy in the nature of mandamus, prohibition, certiorari or habeas corpus.⁹⁰⁹ The judicial review provisions of the *POA* are sections 140, 141 and 142, and are located in Part VII of the *POA* under the heading "Review."

6.3.2 Appeals Under Part I

Section 135 of the *POA* provides:

135. (1) Appeal – A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the Ontario Court of Justice presided over by a provincial justice.

(2) Application for appeal – A notice of appeal shall be in the prescribed form and shall state the reasons why the appeal is taken and shall be filed with the clerk of the court within fifteen days after the making of the decision appealed from, in accordance with the rules of court.

907 O.Reg 723/94 Rule 11(2).

908 Section 138(1).

909 Section 140 and 142 *POA*.

(3) Notice of hearing – The clerk shall, as soon as is practicable, give a notice to the defendant and prosecutor of the time and place of the hearing of the appeal.

The rules of O.Reg. 722/94 which are relevant to s. 135 are the following:

Filing of Notice of Appeal

Notice of appeal

- (1) A notice of appeal shall be in Form 1.

Time and place for hearing

- (2) Upon the filing of the notice of appeal, the clerk shall set a time and place for the hearing of the appeal in accordance with section 135 of the Act.

Notice to respondent

- (3) The clerk shall give the respondent a copy of the filed notice of appeal and a notice of the time and place of the hearing in Form 2.

Timely notice

- (4) Notice of the time and place of the hearing shall be given at least 15 days before the day set for the hearing.

Certificate

- (5) A certificate of giving a notice under rule (3) endorsed on the notice by the clerk shall be received in evidence and, in the absence of evidence to the contrary, is proof that the notice was given.

Extension or Abridgment of Time

Judge's power

A judge may extend or abridge the time for bringing an appeal and for doing any other act in connection with an appeal for which a time is prescribed before or after the expiration of the time prescribed.

Notice

- (2) A notice of motion to extend or abridge time shall be given to the opposite party, unless otherwise directed by a judge.

Transcripts

Transcript not required

9. (1) Unless a judge orders otherwise, a party to an appeal need not provide a transcript of all or any part of the evidence at trial.

Transcripts required

- (2) Where the court orders that a transcript of all or any part of the evidence at trial be provided under clause 136(3)(a) of the Act or a party to an appeal files such a transcript, an appellant shall file and deliver to the respondent,
- (a) in an appeal against conviction or acquittal, one copy of the transcript of evidence at trial, including reasons for judgment; and
 - (b) in an appeal against conviction and sentence or sentence only, one copy of the transcript of evidence at trial and submissions on sentencing, including reasons for judgment and sentence, if any.

Transcript to Crown Attorney

Where the Crown Attorney has given notice of intervention after receiving notice of appeal, the appellant shall deliver a copy of the transcript of evidence at trial, including reasons for judgment and sentence, if any, to the Crown Attorney.

Directions

12. A party to an appeal may make a motion to the court at any time for directions with respect to the conduct of the appeal.

a. Parties and Grounds for Appeal to the Ontario Court of Justice

Pursuant to s. 135, a defendant may appeal a conviction, a prosecutor may appeal an acquittal, and both parties may appeal sentence in proceedings commenced by certificate of offence under Part I. The appeal lies to a justice of the Ontario Court of Justice, even where the trial was before another justice of the Ontario Court of Justice and not a justice of the peace.⁹¹⁰ Additionally, s. 135 allows for the Attorney General to appeal by way of intervention to the same court.

910 *R. v. Greening* (1993), 47 M.V.R. (2d) 167 (Ont. Ct. (Prov. Div.)).

There is no requirement to obtain leave to appeal at this level. An appeal is available as of right. The availability of relief to the public through a readily accessible appeal court⁹¹¹ is consistent with the legislative framework of the *POA*, which is intended to alleviate inconvenience, costs and hardship to defendants charged with offences under provincial Acts, and to remedy an over-taxed court system.⁹¹²

Whether the court has jurisdiction to hear an appeal depends on whether the order appealed from falls within the interpretation of "acquittal, conviction or sentence" as proscribed by s. 135. Rights of appeal in Part I proceedings under the *POA* are broad.⁹¹³ As noted by Drinkwater and Ewart in *Ontario Provincial Offences Procedure*:

[T]he *Provincial Offences Act* has created an entirely new type of appellate remedy for minor offences. If proceedings are taken under Parts I or II, then the more complex and expensive appellate remedies are replaced by a simple quick, inexpensive method of obtaining a review of the conviction, acquittal or sentence. This review is available regardless of whether the defendant appeared at trial, was convicted at a trial *in absentia* or was convicted administratively under s. 9.⁹¹⁴

The theme permeating the case law which has interpreted s. 135 is consistent with the intent that appeals be widely available and geared towards an expedient and inexpensive means of review of a conviction, acquittal or sentence. In general, where an appeal is available, a party must pursue his or her appeal rights rather than seeking a prerogative remedy under s. 140 of the *POA*.⁹¹⁵ Accordingly, relief is available by way of an appeal, rather than by way of review, from the following orders:

- a stay of proceedings,⁹¹⁶ including a stay of proceedings granted as a remedy for an alleged breach of the *Charter*;⁹¹⁷
- an order quashing a certificate of offence on the basis of lack of sufficiency;⁹¹⁸
- a refusal of the trial justice to amend a certificate of offence;⁹¹⁹ and

911 *R. v. Filipovic*, [1996] O.J. No. 3139 (Ont. Ct. (Prov. Div.)) (Q.L.).

912 *R. v. Carson* (1983), 4 C.C.C. (3d) 476 (Ont. C.A.).

913 *R. v. Anderson*, [1985] O.J. No. 608 (Ont. (H.C.)) (Q.L.).

914 Drinkwater W.D. and Ewart J.D., *Ontario Provincial Offences Procedure* (Toronto: Carswell 1980) at 355; see also *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont.C.A.) (in chambers), aff'd 66 C.C.C. (2d) 576n (Ont.C.A.).

915 *R. v. Tucker* (1992), 9 O.R. (3d) 291 (Ont. Ct. (C.A.)); *R. v. Barker*, [1992] O.J. No. 545 (Ont. Ct. (Gen. Div.)) (Q.L.); *R. v. Anderson*, [1985] O.J. No. 608 (H.C.)(Q.L.).

916 *Toronto (Municipality) v. Miller* (1994), 20 C.R.R. (2d) 81, (Ont. Ct. (Prov. Div.)); *R. v. Pham*, [1995] O.J. No. 2239 (Ont. Ct. (Prov. Div.)) (Q.L.).

917 *R. v. Boise Cascade Canada Ltd.* (1991), 14 W.C.B. (2d) 259, [1991] O.J. No. 1831 (Ont. Ct. (Gen. Div.)) (Q.L.); *R. v. Barker*, [1992] O.J. No. 545 (Ont. Ct. (Gen. Div.)) (Q.L.).

918 *R. v. Elliot* (5 September 1995), (Ont. Ct. (Prov. Div.)) [unreported]; *R. v. Alves*, [1994], O.J. No. 966 (Ont. Ct. (Prov. Div.)) (Q.L.).

919 *R. v. Potter* (1982), 17 M.V.R. 54 (Ont. H.C.). But see *R. v. West* (1982), 35 O.R. (2d) 179 (Ont. H.C.).

- where the trial justice did not have jurisdiction to try the defendant, or the proceedings below were a nullity, e.g. on account of lack of service of the offence notice or summons.⁹²⁰

b. Commencing an Appeal

Filing a notice of appeal in Form 1 within 15 days of the order appealed from commences the appeal.⁹²¹ A defendant may bring a motion, with notice to the respondent, for an extension of time for filing the notice of appeal.⁹²² The notice of appeal must state the grounds for the appeal.⁹²³ When the notice of appeal is filed, the clerk of the court will set a time and place for the hearing. The clerk will then give the respondent a copy of the notice of appeal and a notice of hearing in Form 2 at least 15 days before the hearing date.⁹²⁴

c. Motion to Extend Time to File Appeal⁹²⁵

A defendant may move for an extension of time for filing the notice of appeal beyond the 15 day limitation period. The rules require a defendant to provide the respondent with notice of the motion unless otherwise directed by the judge.⁹²⁶ However, as a general rule, notice of the motion should be provided to the respondent.⁹²⁷ An appeal court will have jurisdiction to grant an *ex parte* order extending the time for filing an appeal only where there is some evidence of exceptional circumstances before the court justifying such an order.⁹²⁸

The burden is on the defendant to establish that an extension of time to file a notice of appeal should be granted. In determining whether to grant an extension, the court may consider the following factors:

- whether the defendant has shown a *bona fides* intention to appeal within the appeal period;
- whether the defendant has provided an explanation for the delay;

920 *R. v. Hilaire*, [1999] O.J. No. 898 (Ont. Ct. (Prov. Div.)) (Q.L.).

921 Section 135(2); O.Reg. 722/94 Rule 6(1).

922 O.Reg. 722/94 Rule 8.

923 Section 135(2).

924 Section 135(3); O.Reg. 722/94 Rule 6.

925 O.Reg. 722/94, Rule 8(1).

926 O.Reg. 722/94, Rule 8(2).

927 *R. v. Brophy*, [1986] O.J. No. 1107 (Ont. Ct. (H.C.)) (Q.L.).

928 *R. v. Schneiderman*, [1984] O.J. No. 310 (H.C. (Q.L.)); *R. v. Brophy*, [1986] O.J. No. 1107 (Ont. Ct. (H.C.)) (Q.L.).

- whether the opposing party has been prejudiced by the delay; and
- whether the appeal has a reasonable chance of success.⁹²⁹

None of these factors are decisive. The importance of any of the factors, and the balance to be struck between the factors, is clearly within the discretion of the justice determining the motion.⁹³⁰ The primary consideration is to prevent an injustice to the defendant.⁹³¹ Accordingly, if the failure to file a notice of appeal within 15 days is the fault of defendant's counsel or agent's, an extension will be granted to the defendant.⁹³² In contrast, where the defendant seeks an extension of time to appeal sentence a significant amount of time after his sentencing date, it would not be an injudicious exercise of discretion to dismiss the application if the defendant is unable to explain the delay, admits that he did not intend to appeal the sentence within the 15 day period, and/or is unable to establish that the appeal has sufficient merit.⁹³³

Note that, consistent with the expeditious and informal nature of the Part I appeal process, and in particular the legislative intent that the POA not be a trap for inexperienced litigants,⁹³⁴ the test for an extension of time for filing will not necessarily be rigidly applied. Given that the primary consideration is to prevent an injustice to the defendant,⁹³⁵ the test for granting an extension of time to file will be relaxed where it appears that granting an extension is consistent with the best interests of the administration of justice.

The prosecutor must satisfy a similar test when it is sought to extend the time to file a notice of appeal against acquittal or sentence. The prosecutor must establish:

- a *bona fide* intention to appeal within the 15 day period; and
- there are arguable grounds of appeal.⁹³⁶

With respect to the second requirement, the prosecutor must only establish that the appeal is not frivolous. The prosecutor does not have to establish that the appeal will probably succeed. Additionally, unlike motions for an extension of time to file a notice of appeal in criminal proceedings, the prosecutor does not have to establish that he or she

929 *R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.).

930 *R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.); *Children's Aid Society of Winnipeg v. Brooklands* (1946), 86 C.C.C. 227 (Man. C.A.).

931 *R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.); *R. v. Closs* (1998), 37 W.C.B. (2d) 157 (Ont.C.A.).

932 *R. v. Murray* (1986), 176 A.P.R. 155 (N.S. C.A.); *R. v. Truong* (1992), 27 W.A.C. 124 (B.C. C.A.).

933 See *R. v. Keen* (1996), 29 O.R. (3d) 93 (C.A.).

934 *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont.C.A.) (in chambers), aff'd 66 C.C.C. (2d) 576n (Ont.C.A.).

935 *R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.); *R. v. Closs* (1998), 37 W.C.B. (2d) 157 (Ont.C.A.).

936 *R. v. Gruener* (1979), 46 C.C.C. (2d) 88 (Ont. C.A.).

has exercised reasonable diligence in attempting to locate the defendant for service.⁹³⁷

d. Transcripts

In general, transcripts are not required for appeals in Part I proceedings. However, a party to the appeal may choose to file a transcript of the evidence, or the court may order the defendant under s. 136(3)(a) to provide a copy of the transcript for all or part of the evidence taken at trial.⁹³⁸ A transcript will be particularly appropriate where the defendant, who has had his or her day in court, seeks to disagree with the ruling of the trial justice on appeal. A transcript promotes an efficient hearing of an appeal in such circumstances.

An order for a transcript may be granted on a motion for directions under O. Reg. 722/94 Rule 12. A party to the appeal may ask for directions from the court at any time. Additionally, a defendant shall provide the Crown Attorney with a copy of the transcript where the Crown Attorney files a notice of intervention.⁹³⁹ In all cases where a transcript is filed, the defendant/appellant shall file one copy with the court, and file and deliver one copy to the respondent.⁹⁴⁰

6.3.3 Conduct of the Appeal – Review

An appeal in Part I proceedings is conducted by means of a review. This is clear from s. 136, which provides:

136. (1) Conduct of appeal – Upon an appeal, the court shall give the parties an opportunity to be heard for the purpose of determining the issues and may, where the circumstances warrant it, make such inquiries as are necessary to ensure that the issues are fully and effectively defined.

(2) Review – An appeal shall be conducted by means of a review.

(3) Evidence – In determining a review, the court may,

- (a) hear or rehear the recorded evidence or any part thereof and may require any party to provide a transcript of the evidence, or any part thereof, or to produce any further exhibit;
- (b) receive the evidence of any witness whether or not the witness gave

⁹³⁷ An appellant in Part I appeal proceedings does not have to serve a notice of appeal on the respondent: see section 135 and O.Reg. 722/94 (the "Rules").

⁹³⁸ O.Reg. 722/94 Rule 9(2).

⁹³⁹ O.Reg. 722/94 Rule 9(3).

⁹⁴⁰ O.Reg. 722/94 Rule 9(2).

evidence at the trial;

- (c) require the justice presiding at the trial to report in writing on any matter specified in the request; or
- (d) receive and act upon statements of agreed facts or admissions.

Section 136(1) directs the court to "give the parties an opportunity to be heard for the purpose of determining the issues", and empowers the court to "make such inquiries [of the parties] as are necessary to ensure that the issues are fully and effectively defined." Section 136(1) reflects the reality that many appeals from proceedings commenced by certificate of offence are brought by unrepresented defendants who likely do not have the legal training nor the familiarity with the applicable substantive law to adequately state the grounds of appeal in their notices of appeal. As noted in *R. v. Jamieson*, "[t]he *Provincial Offences Act* is not intended as a trap for the unskilled or unwary but rather, as an inexpensive and efficient way of dealing with, for the most part, minor offences."⁹⁴¹ In this manner, s. 136(1) operates as a counter-balance to the requirement in s. 135(2) that the notice of appeal "shall state the reasons why the appeal is taken."

Pursuant to s. 136(2), an appeal is to be conducted by means of a review. A review is a reconsideration of the trial proceedings. The nature and purpose of a review pursuant to s. 136 was discussed by Libman J. in *R. v. Francisty*:

An appellate court acting under s. 136(2) of the *Provincial Offences Act* is to conduct the appeal by means of a review, that is a reconsideration of the trial proceedings. This provision reflects the informal nature of appeals in respect of Part I and II proceedings. Put another way, this form of appeal was clearly intended by the Legislature to be very broad: appellate relief is available as of right and there are no restrictions on the sorts of issues which may be raised: *R. v. Stephenson* (1984), 13 C.C.C. (3d) 112 (Ont. C.A.); *R. v. Murray* (1983), 22 M.V.R. 66 (Ont. H.C.); *R. v. Anderson*, 28 November 1985, Doc. 2716/85 (Ont. S.C.).⁹⁴²

Section 136(3) empowers the court determining the review to hear or rehear the recorded evidence,⁹⁴³ to require any party to provide a transcript of the evidence,⁹⁴⁴ and to receive

941 *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.) (in chambers), aff'd 66 C.C.C. (2d) 576n at 552 (Ont. C.A.); see also *R. v. Murray* (1983), 22 M.V.R. 66 at 74-75 (Ont. H.C.).

942 *R. v. Francisty*, [1997] O.J. No. 2118 (Ont. Ct. (Prov. Div.)) (Q.L.), per Libman J., at para. 12.

943 Section 136(3)(a); See *R. v. Francisty*, [1997] O.J. No. 2118 (Ont. Ct. (Prov. Div.)) (Q.L.).

944 Section 136(3)(a).

the evidence of any witness whether or not the witness gave evidence at trial.⁹⁴⁵ This last power in essence permits the court to receive fresh evidence on an appeal without the need for a prior application by either party.⁹⁴⁶

The conduct of a review, in particular the power to receive further evidence, has been likened to a *trial de novo*.⁹⁴⁷ However, the authority to conduct a review does not confer the authority upon an appeal court to arbitrarily substitute its view for that of the trial justice, who had the advantage of hearing and seeing the parties.⁹⁴⁸ The powers of the court regarding the disposition of an appeal are established by section 138 of the POA, and are discussed below.

6.3.4 Powers of the Court on Appeal

Section 138 provides:

138. (1) Powers of court on appeal – Upon an appeal, the court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.

(2) New trial – Where the court directs a new trial, it shall be held in the Ontario Court (Provincial Division) presided over by a justice other than the justice who tried the defendant in the first instance, but the appeal court may, with the consent of the parties to the appeal, direct that the new trial be held before the justice who tried the defendant in the first instance or before the justice who directs the new trial.

(3) Costs – Upon an appeal, the court may make an order under section 60 for the payment of costs incurred on the appeal, and subsection (3) thereof applies to the order.

Rule 15 provides:

Notice of Decision of Court

Notice of decision on appeal

⁹⁴⁵ Section 136(3)(b).

⁹⁴⁶ *R. v. Stephenson* (1984), 13 C.C.C. (3d) 112 (Ont. C.A.).

⁹⁴⁷ *R. v. Murray* (1983), 22 M.V.R. 66 at 74 (Ont. H.C.).

⁹⁴⁸ *R. v. Yeves* (1987), 36 C.C.C. (3d) 417 at 430 (S.C.C.).

15. (1) Immediately after the disposition of an appeal, the clerk shall give notice of the court's decision, including any written reasons and endorsements,

- a) to each party to the appeal who was not present in person or by counsel when the decision was made
- b) to the clerk of the court; and
- c) to the Crown Attorney, where a prosecutor is not acting on behalf of the Crown.

Deemed receipt of notice of trial

(2) Where the appeal court directs a new trial and sets a date for the trial with the consent of the parties, the defendant is deemed to have received notice of trial.

Subsection 138(1) provides a court hearing an appeal from Part I proceedings with wide dispositive powers.⁹⁴⁹ "The court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial."

Although section 138 establishes many options with respect to the outcome of an appeal, no instruction is provided as to how these dispositive powers are to be exercised. Combined with the court's wide powers in respect to the conduct of an appeal, it may be argued that an appeal court in Part I proceedings has unfettered discretion regarding the disposition of an appeal.

However, a review of the *Act* and caselaw clearly support the position that an appeal court in Part I proceedings is governed by principles which define and limit the powers of disposition applicable to all appellate courts in criminal and quasi-criminal proceedings. In particular, the provisions of the *POA* which define the powers of the court regarding the disposition of appeals from conviction, acquittal and sentence in Part III proceedings, sections 120, 121, and 122 respectively, may be relied upon to define the powers of the court on an appeal from proceedings commenced under Part I.

First, other provisions contained under the heading "Appeals Under Part III" directly apply to appeals from Part I proceedings. For example, where an appeal from conviction is based upon an alleged defect in the substance or form of the certificate of offence, the dispositive powers of the court are defined by section 124 of the *POA*. Section 124 is located in the Part III appeal provisions. There is no provision regarding appeals from

949 *R. v. Murray* (1983), 22 M.V.R. 66 at 74 (Ont. H.C.).

alleged defects in certificate of offence contained under the heading "Appeals Under Parts I and II."

Second, the caselaw that has considered the powers of a court determining an appeal from proceedings commenced under Part I supports the applicability of traditional appellate review principles. The following passage from *R. v. Mei* succinctly describes the jurisdiction of the court hearing an appeal under section 135:

As the Crown has alluded to, the jurisdiction of this Court is one of review. I look at what happened in the Provincial Offences Court. I keep in mind in doing so that the trial judge in that court had the opportunity to consider the witnesses, had the opportunity to consider their evidence, the manner in which they gave their evidence and also to assess the facts. Clearly, I should not arbitrarily substitute my view of the evidence for that of the learned justice in the Provincial Offences Court, and I keep reminding myself, as others have to at times, that a trial is a trial. It is not a trial run. If you are not happy with it you don't come back and have another go at it.

Also, it is quite clear that it is beyond the power of this Court to interfere with Her Worship's decision if the decision is made rationally and reasonably.

Also, when the Court looks at the review situation, if the record, including the Reasons for Judgment, discloses a lack of appreciation of the relevant evidence, then of course the reviewing court is entitled to intercede. Also, it is quite clear that the finding of fact that was made in the Provincial Offences Court can only be reversed by this Court if the finding of facts were unreasonable or they were based upon a wrong decision on a question of law.⁹⁵⁰

The following comments of Libman J. in *R. v. Francisty* are apposite:⁹⁵¹

Notwithstanding the broad jurisdiction of a reviewing court pursuant to s. 136(2) of the Provincial Offences Act, the court, in my view, must be chary of subjecting the reasons below to microscopic scrutiny or merely substituting its opinion for that of the trier of fact in the absence of a clear basis for doing so.

a. Appeals from Conviction

Section 135 permits a defendant in Part I proceedings to appeal a conviction. Subsection 138(1) provides that on an appeal from conviction, the court may affirm or reverse the decision appealed from. Section 120 of the *POA*, which establishes the powers of the

950 *R. v. Mei*, [1996] O.J. No. 3833 (Ont. Ct. (Prov. Div.)) (Q.L.) *per* Montgomery J., at para. 5-8; See also *R. v. McGuire*, [1996] O.J. No. 3832 (Prov. Div.) (Q.L.).

951 *R. v. Francisty*, [1997] O.J. No. 2118 (Ont. Ct. (Prov. Div.)) (Q.L.).

court in an appeal from conviction in Part III proceedings, may be relied upon to define the powers of a court hearing an appeal from conviction entered in Part I proceedings.⁹⁵²

120. (1) Powers on appeal against conviction - On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,

(a) may allow the appeal where it is of the opinion that,

- (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

- (i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
- (iii) although the court is of the opinion that on any ground mentioned in subclause (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

(2) Idem - Where the court allows an appeal under clause (1)(a), it shall,

(a) where the appeal is from a conviction,

- (i) direct a finding of acquittal to be entered, or
- (ii) order a new trial; or

(b) where the appeal is from a finding as to the ability, because of mental disorder, to conduct a defence, order a new trial, subject to section 44.

(3) Idem - Where the court dismisses an appeal under clause (1)(b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

⁹⁵² See the discussion in Section 6.3.3 of the Handbook, above.

The language of section 120 essentially mirrors the language of subsections 686(1), (2) and (3) of the *Criminal Code*.⁹⁵³ Accordingly, the caselaw that has interpreted subsections 686(1), (2) and (3) may assist in defining the powers of the court hearing an appeal from conviction in proceedings commenced under Part I.⁹⁵⁴

(i) Unreasonable Verdict

Subsection 120(1)(a)(i) provides that an appeal from conviction may be allowed where the finding below is unreasonable or cannot be supported by the evidence.

A verdict is unreasonable only where no properly instructed jury acting judicially could have rendered it.⁹⁵⁵ In applying this test, the reviewing court must consider all of the evidence before the trier of fact.⁹⁵⁶ Such a consideration involves re-examining and, to some extent, re-weighing and considering the evidence.⁹⁵⁷ If, after a consideration of the evidence, the reviewing court determines that the trial judge's findings of fact or the inferences drawn from the findings of fact are not supported by the evidence, the conviction cannot stand. However, if the verdict is one that a properly instructed jury acting reasonably could have reached, the reviewing court cannot substitute its opinion for that of the trial justice.⁹⁵⁸

(1) Failure to Provide Reasons

The failure of the trial justice to indicate expressly in his or her reasons that all relevant considerations have been taken into account in arriving at a verdict is not a sufficient basis to allow an appeal,⁹⁵⁹ nor is the failure to give reasons an error of law.⁹⁶⁰ A trial justice is presumed to know the law, and does not have to demonstrate that he or she knows the law and has considered all aspects of the evidence.⁹⁶¹ Only where a full and fair reading of the trial justice's reasons reveals a failure to grasp an important point must the reasons be reviewed to determine whether the oversight affected the validity of the verdict. "Notwithstanding the broad jurisdiction of the reviewing court pursuant to s. 136(2), the court must avoid subjecting the reasons below to microscopic scrutiny or merely

953 Subsections 686(1), (2) and (3) *Criminal Code* are not reproduced here due to their length.
 954 Subsection 2(2) *POA*.
 955 *R. v. Yeboes* (1987), 36 C.C.C. (3d) 417 (S.C.C.).
 956 *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.); *R. v. Francois* (1994), 91 C.C.C. 289 (S.C.C.); *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.).
 957 *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.); *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.). See also *R. v. Smith* (1997), 35 W.C.B. (2d) 203 (Ont. Ct. (Prov. Div.)).
 958 *R. v. MacDonald* (1976), 29 C.C.C. (2d) 257 (S.C.C.) at 262; *R. v. Hunter* (1985), 23 C.C.C. (3d) 331 (Alta. C.A.).
 959 *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.) at 199.
 960 *R. v. G.(M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.); *R. v. Francisty*, [1997] O.J. No. 2118 (Prov. Div.) (Q.L.).
 961 *R. v. Francisty*, [1997] O.J. No. 2118 (Prov. Div.) (Q.L.).

substituting its opinion for that of the trier of fact in the absence of a clear basis for doing so."

The policy underlying the rule that the failure of a trial justice to canvass all aspects of the evidence and law in his or her reasons does not constitute reversible error was discussed by McLachlin J., speaking for the court, in *R. v. Burns* (1994), 89 C.C.C. (3d) 193 at p.199-200 (S.C.C.):

This rule makes good sense. To require trial judges charged with heavy case-loads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

McLachlin J.'s (as she was then) comments apply with equal force in the provincial offences context, where trial justices are faced with heavy case loads daily. Due to the volume of cases disposed of daily in provincial offences courts, requiring justices determining provincial offences matters to provide extensive reasons would be impractical and undesirable.⁹⁶²

(2) Credibility

Special concerns arise when the basis for attacking the validity of the decision below is an allegation that the trial justice erred in his or her findings regarding the credibility of a witness, or the defendant. The credibility of a witness is a question of fact, and cannot be determined by fixed rules. A number of factors combine to produce a witness' "credibility." Chief amongst the factors is the demeanour of the witness while testifying. Other factors include the witness' opportunity for knowledge, powers of observation, judgment, memory, and ability to describe what was observed.⁹⁶³

The presence of a motive to concoct,⁹⁶⁴ and the level of consistency between the witness' testimony and the witness' prior statements,⁹⁶⁵ and other circumstances of the case itself,⁹⁶⁶ are also important factors to be considered.

962 *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.); See *R. v. MacDonald* (1976), 29 C.C.C. (2d) 257 at 262-263 (S.C.C.).

963 *Faryna v. Chorny* (1952), 2 D.L.R. 354 at 356-57 (B.C.C.A.).

964 *R. v. Francois* (1994), 91 C.C.C. 289 at 296-97 (S.C.C.).

965 *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.).

966 *Faryna v. Chorny* (1952), 2 D.L.R. 354 at 356-57 (B.C.C.A.).

Although a number of factors combine to establish a witness' credibility, the demeanour of the witness while testifying is the most significant factor relied upon by triers of fact.⁹⁶⁷ Consequently, while conducting a review, the reviewing justice must remain conscious of the advantage enjoyed by the trial court on the issue of credibility.⁹⁶⁸ Unlike a justice hearing an appeal, trial justices have the opportunity to hear, and more importantly, observe witnesses while they give their testimony. The opportunity to see a witness testify provides insight into the credibility of the witness and the reliability of his or her evidence, an advantage which is not matched by reading or listening to a copy of the transcript. Accordingly, great deference should be accorded to findings of credibility made at trial.⁹⁶⁹

Nevertheless, the reviewing court may reverse the verdict where the trial justice's assessment of credibility is not supported by the evidence.⁹⁷⁰ This power to reverse a verdict, although "sparingly used", arises where a review of the evidence and the trial justice's reasons demonstrates that the trial justice either failed to appreciate the significance of a material inconsistency or other weakness affecting the credibility of the witness, or chose to disregard it.⁹⁷¹ While it is open to a trial justice to accept a witness' testimony in the face of a material inconsistency, a trial justice must properly assess the inconsistency along with all relevant factors, in addition to demeanour, before doing so. If this assessment was not conducted, the reviewing court may reverse the verdict.

Question of Law

An appeal to the Ontario Court of Justice from a conviction entered in Part I proceedings may also be allowed where the trial justice erred on a question of law.⁹⁷²

A question of law concerns the legal effect to be given to an established set of facts.⁹⁷³ Questions of law include the interpretation of a statutory provision,⁹⁷⁴ the admissibility of evidence and the determination of whether, on a given set of facts, a person's constitutional rights have been infringed.⁹⁷⁵

⁹⁶⁷ *White v. The King* (1947), 89 C.C.C. 148 (S.C.C.); *R. v. C. (R.)* (1992), 81 C.C.C. (3d) 418 at 422 (Que. C.A.), aff'd (1993), 81 C.C.C. (3d) 417 (S.C.C.). The weight that is placed upon the opportunity to observe a witness' demeanour while testifying led to the observation in *White* that, "Ultimately, [credibility] is a matter that must be left to the common sense of the trier of fact".

⁹⁶⁸ *R. v. Burke* (1996), 105 C.C.C. (3d) 205 at 211-12 (S.C.C.).

⁹⁶⁹ *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 at 141-42 (S.C.C.); *R. v. Francois* (1994), 91 C.C.C. 289 at 296 (S.C.C.); *R. v. Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.).

⁹⁷⁰ *R. v. Burke* (1996), 105 C.C.C. (3d) 205 at 211-12 (S.C.C.).

⁹⁷¹ *R. v. G.(M.)* (1994), 93 C.C.C. (3d) 347 at 353 (Ont. C.A.).

⁹⁷² Subsection 120(1)(a)(ii) POA.

⁹⁷³ *R. v. Johnson* (1972), 13 C.C.C. (2d) 402 (S.C.C.). See also *R. v. Malfese* (1997), 100 O.A.C. 234.

⁹⁷⁴ *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.).

⁹⁷⁵ *R. v. Dunnett* (1990), 62 C.C.C. (3d) 14 (N.B. C.A.).

The failure to provide reasons is not an error of law,⁹⁷⁶ nor must a trial justice discuss every aspect of the case in his or her reasons for judgment.⁹⁷⁷ However, if a review of the evidence reveals that the trial justice failed to appreciate a relevant issue or significant evidence, the reviewing court must examine the reasons to determine the effect of the oversight on the validity of the verdict.⁹⁷⁸

(1) No Substantial Wrong or Miscarriage of Justice

It is important to note that not all errors of law require that an appeal from conviction be allowed. A justice hearing an appeal has a residual discretion to dismiss the appeal if the error of law is not of a sufficient magnitude to afford a remedy. If no substantial wrong or miscarriage of justice is occasioned by the trial justice's error of law, the appeal may be dismissed notwithstanding the error. To rely on the no substantial wrong or miscarriage of justice proviso, the onus is on the prosecutor to demonstrate that the verdict would necessarily have been the same even if the error of law had not been made.

Another way of framing the no substantial wrong or miscarriage of justice test is this: whether there is any reasonable possibility that the verdict would have been different had the error not occurred. If such a possibility exists, the appeal should be allowed, and an acquittal entered or a new trial ordered.

b. Appeals from Acquittal

Pursuant to section 135 of the *POA*, the prosecutor may appeal an acquittal entered in proceedings commenced by certificate of offence. The powers of the court on an appeal from an acquittal in Part I proceedings are conferred by section 138 of the *POA*. The appeal court may affirm or reverse the decision appealed from. In addition, where it is necessary in the interests of justice to do so, the court may direct a new trial. Section 121 of the *POA* provides direction regarding the powers of the court as to the disposition of an appeal from acquittal entered in Part I proceedings.

121. Powers on appeal against acquittal - Where an appeal is from an acquittal, the court may by order,

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the finding and,

⁹⁷⁶ *R. v. Hunter* (1985), 23 C.C.C. (3d) 331 (Alta. C.A.); *MacDonald v. R.* (1976) 29 C.C.C. 2d 257 at 262-63 (SCC); *R. v. Harper* (1982) 65 C.C.C. (2d) 193 at 210-11 (SCC).

⁹⁷⁷ *R. v. G(M)* (1994), 93 C.C.C. (3d) 347 at 353 (Ont. C.A.); *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.).

⁹⁷⁸ *R. v. G(M)* (1994), 93 C.C.C. (3d) 347 at 353 (Ont. C.A.); *R. v. Hunter* (1985), 23 C.C.C. (3d) 331 (Alta. C.A.); *R. v. Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.).

- (i) order a new trial, or
- (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

Pursuant to section 121, on an appeal from acquittal, the court may dismiss the appeal, or allow the appeal. If the appeal is allowed, the court may order a new trial or, in exceptional circumstances, enter a conviction and impose sentence.

The language of section 121 essentially mirrors the language of subsection 686(4) of the *Criminal Code*.⁹⁷⁹ Accordingly, the principles which apply to the interpretation of subsection 686(4) of the *Criminal Code* may be relied upon to define the powers of the POA appeals court considering an appeal from an acquittal in Part I proceedings.⁹⁸⁰

On an appeal from an acquittal, the court is restricted to a re-consideration of the trial proceedings.⁹⁸¹ In particular, the prosecutor is not permitted to advance a new theory of liability on the appeal, or raise arguments on the appeal that it chose not to advance at trial.⁹⁸²

The test to be met by the prosecutor before an appeal from acquittal which will be allowed was established in *Vezeau v. R.*⁹⁸³ To be successful on an appeal from acquittal, the prosecutor must satisfy the court that "the verdict would not necessarily have been the same" had the error not been made.⁹⁸⁴ The onus to be met by the prosecutor is a heavy one.⁹⁸⁵ The underlying rationale for the test is based upon double jeopardy principles.⁹⁸⁶ As noted in *R. v. Morin*, "[a]n accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it."⁹⁸⁷

979 Subsection 686(4) of the *Criminal Code* provides: 686. ... (4) Appeal from acquittal - Where an appeal is from an acquittal, the court of appeal may, (a) dismiss the appeal; or (b) allow the appeal, set aside the verdict and (i) order a new trial, or (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

980 Subsection 2(2) POA.

981 Subsection 136(1) POA.

982 *R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.) at 494.

983 *Vezeau v. R.* (1976), 28 C.C.C. (2d) 81 (S.C.C.).

984 *Vezeau v. R.* (1976), 28 C.C.C. (2d) 81 at 87 (S.C.C.); See also *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.) at 220-221; and *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) at 29-31.

985 *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.) at 220-221; *R. v. Evans* (1993), 82 C.C.C. (3d) 338 (S.C.C.) at 350.

986 *R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.) at 494.

987 *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.) at 221.

In general, where an appeal from acquittal is allowed, the court will order a new trial. In exceptional circumstances, however, the court may enter a conviction and impose sentence. This limited discretion will be exercised where the prosecutor satisfies the court that:⁹⁸⁸

- the verdict would not have been the same had the error not been made; and
- all the findings of fact necessary to support a verdict of guilty were made, either explicitly or implicitly, or are not in issue.

c. Appeals from Sentence

Pursuant to subsection 138(1), on an appeal from sentence the court may “affirm, reverse or vary the decision appealed from.” Although contained in the Part III appeal provisions, section 122 provides guidance regarding the powers of an appeal court considering the fitness of a sentence imposed in Part I proceedings.⁹⁸⁹

122. (1) Appeal against sentence – Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

(2) Variance of sentence – A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court.

On an appeal from sentence in POA proceedings, the court must consider the fitness of the sentence appealed from.⁹⁹⁰ This power of review is not limited to a consideration of whether the trial justice erred in his or her application of the correct sentencing principles.

The language of subsection 122(1) essentially mirrors the language of section 687(1) of the *Criminal Code*.⁹⁹¹ Accordingly, the principles which apply to the interpretation of

988 *Cassidy v. R.* (1989), 50 C.C.C. (3d) 193 (S.C.C.) at 200; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

989 See the discussion in Section 6.3.3 of the Handbook.

990 *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.).

991 Subsection 687(1) of the *Criminal Code* provides: 687. (1) Powers of court on appeal against sentence – Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or receive, (a) vary the sentence within the limits prescribed by law for the offence of which the accused is convicted; or (b) dismiss the appeal.

section 687 of the *Criminal Code* may be relied upon to define the powers of the POA appeals court considering an appeal from sentence in Part I proceedings.⁹⁹²

In two recent judgments,⁹⁹³ the Supreme Court of Canada has clarified the standard of review applicable to appeals from sentence. Absent: (a) an error in principle; (b) a failure to consider a relevant factor; or (c) an overemphasis of the appropriate factors, an appeal court should vary the sentence imposed at trial only where the sentence is demonstrably unfit.⁹⁹⁴

While appellate courts serve an important function in reviewing and minimizing the disparity between sentences imposed upon similar offenders committing similar offences, the decision of a sentencing justice is entitled to great deference.⁹⁹⁵ Sentencing justices have the advantage of having presided at the defendant's trial, and seeing and hearing all of the witnesses. In contrast, an appellate court must simply rely upon the trial record. Moreover, sentencing Justices, being on the "front lines" of the justice system, have a strong appreciation of the current conditions and needs of their communities. Accordingly, a sentence imposed at trial should not be modified simply because the court feels that a different order ought to have been made.⁹⁹⁶ A sentence imposed at trial should only be varied where it is in *substantial and marked departure* from sentences customarily imposed for similar offenders committing similar offences,⁹⁹⁷ or clearly unreasonable.⁹⁹⁸

In Part I proceedings, penalties are limited to the imposition of a maximum fine of \$500.00.⁹⁹⁹ Imprisonment is not available as a penalty. Consequently, sentence appeals in Part I proceedings involve a consideration of whether the fine imposed at trial was fit, given the circumstances of the defendant and the offence. With respect to the imposition of a fine, the overarching principle is this: any fine imposed should be within the defendant's ability to pay,¹⁰⁰⁰ and should not be of such a magnitude that, given the means of the defendant, it cannot be paid within a reasonable amount of time.¹⁰⁰¹ The significance of the defendant's ability to pay is tempered by the possibility of securing an extension of time for payment of any fine imposed.

992 Subsection 2(2) POA.

993 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) and *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.).

994 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 374 (S.C.C.).

995 *Ibid* at 374-375.

996 *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 at 210-211 (S.C.C.).

997 *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 375 (S.C.C.).

998 *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 at 210-211 (S.C.C.).

999 Subsection 12(1) POA.

1000 *R. v. Snider* (1977), 37 C.C.C. (2d) 189 (Ont. C.A.).

1001 *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.); Subsection 69(15). See also *R. v. Snider* (1977), 37 C.C.C. (2d) 189 (Ont. C.A.) and 5.4.1(a) of the Manual.

In determining the fitness of sentence, the court may have recourse to section 59 of the *POA* to vary a fine, and impose a fine that is less than the minimum prescribed for the offence.¹⁰⁰² This discretion must be exercised judicially. Before reducing a fine imposed at trial, the court must conduct an inquiry into the defendant's ability to pay.¹⁰⁰³ The court's discretion under subsection 59(2) should not be exercised unless the defendant proves, on a balance of probabilities, that there are exceptional circumstances affecting the defendant's life such that imposition of the minimum fine would be: (a) unduly oppressive, or (b) otherwise not in the interests of justice.

d. Costs

(i) Generally

Pursuant to s. 138(3), it is within the discretion of the court to order costs under section 60 *POA* upon disposition of the appeal. Where a conviction is upheld, the defendant/appellant may be ordered to pay court costs¹⁰⁰⁴ in an amount prescribed by R.R.O. 1990, Reg. 945, "Costs."¹⁰⁰⁵ The court may also order costs to the court, the defendant, or the prosecutor towards the payment of witness fees. Witness fees are prescribed by R.R.O. 1990, Reg. 945, "Costs." In proceedings under Part I, the total of witness fees is not allowed to exceed \$100.00. Section 60(3) directs that costs are deemed to be a fine for the purpose of enforcing payment.

The discretion to award costs for witness fees arguably confers the jurisdiction to award a defendant who testifies on his or her appeal costs in respect of his or her capacity as a witness.¹⁰⁰⁶ The court does not have the jurisdiction under the *POA*, however, to order the Crown to pay a defendant's legal costs of the appeal.¹⁰⁰⁷

(ii) As a Remedy for Charter Breach

The provincial offences court is a court of competent jurisdiction to make an order for costs against the Crown as a remedy for a breach of the *Charter*.¹⁰⁰⁸ The jurisdiction of the provincial offences court to grant a *Charter* remedy under section 24(1) of the *Charter* includes the authority to make an order for the payment of legal costs.

¹⁰⁰² *R. v. Monroe*, [1998] O.J. No. 1872 (Ont. C.A.) (Q.L.).

¹⁰⁰³ *R. v. Jansen* (1983), 10 W.C.B. 24 (Ont. Co. Ct.).

¹⁰⁰⁴ Section 60(1).

¹⁰⁰⁵ R.R.O. 1990, Reg. 945, "Costs" [am. O. Reg. 678/92, O. Reg. 501/93; O. Reg. 555/93; O. Reg. 493/94; O. Reg. 240/98].

¹⁰⁰⁶ See *R. v. Lem* (1993), 45 M.V.R. (2d) 322 (Ont. C.A.).

¹⁰⁰⁷ *R. v. 974649 Ontario Inc.* (1998), 130 C.C.C. (3d) 1 at 11 (Ont. C.A.).

¹⁰⁰⁸ *R. v. 974649 Ontario Inc.* (1998), 130 C.C.C. (3d) 1 (Ont. C.A.).

6.3.5 Appeals Based Upon Alleged Defects in the Certificate of Offence

Section 124 of the *POA* governs appeals based upon an alleged defect in the certificate of offence. Although section 124 is contained under the heading "Appeals Under Part III," the language of section 124 makes it clear that it applies to proceedings commenced by certificate of offence. Section 124 provides:

s. 124 (1) Appeal based on defect in information or process - Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused although the variance had misled the appellant.

(2) Idem - Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

Pursuant to subsection 124(1), an appeal from conviction based upon an alleged defect in the substance or form of the certificate of offence or a variance shall not be allowed unless the defendant objected to the alleged defect at trial. The prohibition on appeals from alleged defects or variances absent objection at trial is consistent with the trial justice's broad powers of amendment: absent irreparable prejudice to the defendant's defence, any defect is amendable, even on appeal.¹⁰⁰⁹ A conviction is possible on a defective certificate of offence and will be upheld on appeal so long as the defect did not prejudice the defendant, and the prosecutor proved all essential elements of the offence.¹⁰¹⁰ As long as a document gives fair notice of the offence to the defendant, it is not a nullity and can be amended.¹⁰¹¹ Accordingly, where the defendant did not object to the alleged defect at trial, it should not be open to argue that an appeal from conviction should be allowed on the basis of a defect that did not prejudice the defendant in his or her defence.

1009 *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 312-313 (S.C.C.) *per* Lamer J.; *R. v. P. (M.B.)* (1994), 89 C.C.C. (3d) 289 at 296 (S.C.C.). See also *Lake v. R.* [1969] 2 C.C.C. 224 at 226-227 (S.C.C.), and *Morozuk v. R.* (1986), 24 C.C.C. (3d) 257 (S.C.C.) regarding the broad amendment powers of an appellate court.

1010 *R. v. Cote* (1977), 33 C.C.C. (2d) 353 at 359 (S.C.C.); *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 297-298 (S.C.C.) *per* Dickson C.J.C.

1011 *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 297 (S.C.C.) *per* Dickson C.J.C.

However, subsection 124(1) cannot preclude an appeal court from entering judgment where the certificate of offence is a nullity.¹⁰¹²

A nullity cannot be cured by amendment.¹⁰¹³ Accordingly, a conviction entered following proceedings that were null and void is invalid.

In the case of an appeal based upon a defect in the conviction or order, subsection 124(2) provides that rather than entering judgment in favour of the defendant, the court shall make an order curing the defect. Where the defendant establishes that he or she was improperly convicted of an offence, the appellate justice has the jurisdiction to amend a conviction and substitute whatever verdict should have been entered after trial.¹⁰¹⁴

6.3.6 Dismissal of Appeals as Abandoned

Section 137 of the *POA* provides:

137. Dismissal on abandonment – Where an appeal has not been proceeded with or abandoned, the court may order that the appeal be dismissed.

O.Reg. 722/94 Rules 13 and 14 provide:

Dismissal of Appeal

The court may dismiss an appeal where the defendant:

- (a) does not attend in person or by counsel on the day set by the clerk for the hearing of the appeal;
- (b) has filed a notice of abandonment;
- (c) has not filed a transcript of evidence at trial, including reasons for judgment or sentence, if any, within 30 days after receiving notice of completion of the transcript from the clerk of the Ontario Court of Justice; or
- (d) has failed to comply with an order of the court in respect of the appeal.

Abandonment of Appeals

Notice of Abandonment

14. (1) An appellant who wishes to abandon the appeal may file a notice of abandonment in Form 5.

¹⁰¹² *R. v. Mardave Construction (1990) Ltd.* (1995), 26 W.C.B. (2d) 295 (Ont. Ct. (Prov. Div.)).

¹⁰¹³ *R. v. Moore* (1988), 41 C.C.C. (3d) 289 at 311 (S.C.C.).

¹⁰¹⁴ *Lake v. R.* [1969], 2 C.C.C. 224 at 226-227 (S.C.C.); *Morozuk v. R.* (1986), 24 C.C.C. (3d) 257 (S.C.C.).

Signing to notice

(2) The appellant or counsel for the appellant shall sign the notice of abandonment.

Signing by witness

(3) Where the appellant signs the notice of abandonment, the notice must also be signed by another person who witnesses the signing by the appellant.

Affidavit of execution

(4) Where the witness is not counsel for the appellant, the appellant shall file an affidavit of execution by the witness with the notice of abandonment.

Notice of other parties

(5) The clerk shall give a copy of the filed notice of abandonment to each of the other parties to the appeal.

The court may dismiss an appeal where the appeal has not been proceeded with or has been abandoned. The circumstances in which an appeal may be dismissed are fixed by Rule 13. First, the court may dismiss an appeal where the defendant or counsel on his or her behalf does not attend the appeal. If a defendant fails to attend the appeal and subsequently applies to reopen his or her appeal, corroboration of the defendant's explanation for his or her absence may be required.¹⁰¹⁵

Second, the defendant may initiate the dismissal by filing a notice of abandonment in Form 5 signed by the defendant or his or her counsel. All parties to the appeal will receive a copy of the notice of abandonment from the clerk of the court once the notice is filed.

Third, the court may dismiss an appeal if a transcript of evidence has not been filed within 30 days of the defendant receiving notice of completion of the transcript. Generally, defendants are not required to provide transcripts in POA appeals. However, transcripts are required where a justice so orders, and where the Crown Attorney intervenes in an appeal.¹⁰¹⁶ The failure of the defendant to file a transcript in the above circumstances may result in the dismissal of his or her appeal upon a motion of any of the parties to the appeal.

Finally, an appeal may be dismissed where the defendant fails to comply with any order of the court in respect of the appeal.

¹⁰¹⁵ *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.) (In Chambers); aff'd (1982) C.C.C. (2d) 576 (Ont. C.A.).

¹⁰¹⁶ O.Reg. 722/94 Rule 9.

6.4 Appeals to the Ontario Court of Appeal

An appeal from the decision of a justice of the Ontario Court of Justice lies to the Ontario Court of Appeal. No appeal lies to the Superior Court of Justice.¹⁰¹⁷ Section 139, which governs appeals to the Ontario Court of Appeal, provides:

139. (1) Appeal to Court Appeal – An appeal lies from the judgment of the Ontario Court of Justice in an appeal under section 135 to the Court of Appeal, with leave of a justice of the Court of Appeal, on special grounds, upon any question of law alone.

(2) Grounds for leave – No leave to appeal shall be granted under subsection (1) unless the justice of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

(3) Costs – Upon an appeal under this section, the Court of Appeal may make any order with respect to costs that it considers just and reasonable.

(4) Appeals as to leave – No appeal or review lies from a decision on a motion for leave to appeal under subsection (1).

6.4.1 Grounds for Appeal

An appeal to the Court of Appeal may be taken on a question of law alone. No provision is made for an appeal of sentence in Part I matters. Leave of a justice of the Court of Appeal is required. Leave will be granted only where the justice hearing the leave application, having regard to the circumstances of the particular case, considers it essential: (i) in the public interest; or (ii) for the due administration of justice, that leave be granted. The preceding criteria are disjunctive, *i.e.* an applicant who raises a question of law is only required to meet either, but not both of the criteria in s. 139(2).¹⁰¹⁸

No appeal lies from the decision of the justice who heard the motion for leave. Furthermore, leave to appeal will not be granted where the process in the Ontario Court of Justice has not been completed.¹⁰¹⁹ Thus, no appeal to the court of appeal lies from an order of a justice of the Ontario Court of Justice directing a new trial.

¹⁰¹⁷ *R. v. Weir* [1994], O.J. No. 2102 (C.A.) (Q.L.).

¹⁰¹⁸ *R. v. Krukowski* (1991), 2 O.R. (3d) 155 (Ont. C.A.).

¹⁰¹⁹ *Law Society of Upper Canada v. Boldt*, [1997] O.J. No. 955 (Ont. C.A.) (in chambers) [unreported] (Q.L.).

Section 139(3) provides that the Court of Appeal may make any order regarding costs that is just and reasonable in the circumstances. It is unlikely, however, that s. 139(3) permits the court to make an award of costs with respect to costs on a motion for leave to appeal.¹⁰²⁰

The first prerequisite for leave to appeal to be granted is that the appeal raises a question of law alone. A question of law concerns the legal effect to be given to an established set of facts.¹⁰²¹ Questions of law include the interpretation of a statutory provision,¹⁰²² the admissibility of evidence, the interpretation of a trial justice's reasons on an issue of law¹⁰²³ and the determination of whether, on a given set of facts, a person's constitutional rights have been infringed.¹⁰²⁴ Moreover, where an application for leave to appeal raises a number of issues, leave may only be granted on those issues which raise a question of law. However, if the appellant is successful on the ensuing appeal and a new trial is ordered, the trial will not necessarily be limited to the issues for which leave was granted.¹⁰²⁵

Leave to appeal will not be granted on a question of fact. Questions of fact involve the resolution of a factual issue, and include the sufficiency of evidence,¹⁰²⁶ the proper inferences to be drawn from evidence¹⁰²⁷ and findings of credibility.¹⁰²⁸

Subsection 139(2) is the central provision of s. 139. The prerequisite that an appeal raise issues that are essential in the public interest or for the due administration of justice before leave to appeal will be granted, in conjunction with the lack of a right of appeal from a decision on a leave application, effectively limits the number of appeals of Part I proceedings heard in the Ontario Court of Appeal. In general, appeals to the Ontario Court of Justice are intended to be final, and will be reviewed only in "exceptional cases where the resolution of a question of law alone may have an impact on the jurisprudence in a way that is of general interest to the public or to a broad segment of the public."

¹⁰²⁰ See *R. v. Laundry* (1996), 93 O.A.C. 100 (in chambers).

¹⁰²¹ *R. v. Johnson* (1972), 13 C.C.C. (2d) 402 (S.C.C.). See also *R. v. Maltese* (1997), 100 O.A.C. 234.

¹⁰²² *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.).

¹⁰²³ *R. v. McCullagh* (1990), 53 C.C.C. (3d) 130 (Ont. C.A.).

¹⁰²⁴ *R. v. Dunnett* (1990), 62 C.C.C. (3d) 14 (N.B. C.A.).

¹⁰²⁵ *R. v. Grant Paving & Material Ltd.*, [1995] O.J. No. 849 (Ont. C.A.) [unreported].

¹⁰²⁶ *Sunbeam Corp. v. R.*, [1969] 2 C.C.C. 189 (S.C.C.).

¹⁰²⁷ *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.).

¹⁰²⁸ See *R. v. Idowu*, [1994] O.J. No. 1590 (Ont. C.A.) [unreported] (Q.L.); *R. v. Krukowski* (1991), 2 O.R. (3d) 155 (Ont.C.A.) (in chambers);

The criteria to be met under section 139 before leave to appeal will be granted was discussed in *R. v. Krukowski*:

Although I agree that the section contemplates that leave will be granted to resolve only the most significant issues, I do not think that the words "essential in the public interest" should be so narrowly interpreted as to prevent leave to appeal being granted where the interpretation of a statute raises a question of public importance.

If the adjective "essential" is interpreted as meaning "indispensably requisite", the threshold requirement will bar leave to appeal in all but the most exceptional circumstances. However, if "essential" in the context of [section 139] is taken to mean "material, important", adopting another definition set out in the Shorter Oxford Dictionary, then the interpretation comports with the contextual language, particularly the words "on special grounds" and "in the particular circumstances of the case". The latter interpretation does not fetter the discretion intended to be given to the justice of appeal in his consideration of each application; the narrow interpretation would tend to render [section 139] nugatory.¹⁰²⁹

Nevertheless, the test for leave to appeal is a stringent one. This is clear from the comments of Carthy J.A. (in chambers) in *R. v. Zakarow*:¹⁰³⁰

[Section 139] of the *Provincial Offences Act* sets a very high threshold for granting leave to appeal. There must be special grounds on a question of law and it must be essential in the public interest or for the due administration of justice that leave be granted. *No matter how wrong the judgment under appeal may be, these other criteria must be met. The section was clearly drafted to eliminate all but appeals on the most significant issues.* [emphasis added]

6.4.2 Requests for Crown Appeals

In general, counsel from the Crown Law Office - Criminal, have carriage of crown appeals to the Ontario Court of Appeal in respect of appeals from *HTA*, *CAIA*, and *MSVA* matters. Alternatively, counsel on behalf of the various provincial ministries which conduct prosecutions for provincial offences, such as the Ministry of the Environment, will have carriage of appeals to the Court of Appeal.

For appeals conducted by counsel from the Crown Law Office - Criminal, the Crown Attorney for the jurisdiction in which the offence allegedly was committed or was tried

¹⁰²⁹ *R. v. Krukowski* (1991), 2 O.R. (3d) 155 at 160 (Ont. C.A.) (in chambers)

¹⁰³⁰ *R. v. Zakarow* (1990), 74 O.R. (2d) 621 (Ont. C.A.) (in chambers). See also *R. v. Hovila and Tasanko Trucking Ltd.* (1995), 9 M.V.R. (3d) 95 (Ont. C.A.) (in chambers).

must approve all requests for Crown appeal. The Crown Attorney, if he or she believes the matter merits an appeal, will submit a request for an appeal in writing to the Director of the Crown Law Office - Criminal. The appeal request package must include: a completed "Crown Appeal Checklist;" a memorandum from the Municipal Prosecutor to the Crown Attorney describing the merits of the proposed appeal; a synopsis of the case from the case brief, if any; any available transcripts; any exhibits; copies of any relevant authorities; and a copy of the reasons for judgment or a written summary of the reasons for judgment where the reasons are not available.¹⁰³¹ As notice of motion for leave to appeal to the Ontario Court of Appeal in proceedings under the POA must be filed within 30 days¹⁰³² of the decision appealed from, it is advisable that the appeal request package be completed and submitted to the Crown Attorney as soon as possible.

Generally, it is the policy of the Ministry of the Attorney General to exercise restraint in determining whether to seek leave to appeal unfavourable decisions. Only cases that the public interest requires pursuing should be appealed to the Court of Appeal.¹⁰³³

1031 Ministry of the Attorney General, "AP-1: Appeals", *Crown Policy Manual*.

1032 See O.Reg. 721/94 s. 3(2).

1033 Ministry of the Attorney General, "AP-1: Appeals", *Crown Policy Manual*. In this context, the due administration of justice is included within the ambit of the "public interest". Examples of cases in which leave to appeal to the Ont. C.A. has been granted include: *R. v. Fox*, [1994] O.J. No. 667 (Ont. C.A.) [unreported]. (Whether s.21(2) of the *Game and Fish Act* was enacted to promote safety in hunting so as to justify overriding native treaty rights); *Ramsden v. Peterborough (City)* (1991), 85 D.L.R. (4th) 76 (Ont. C.A.) (Whether municipal by-law which prohibits affixing of posters on all public property constitutes a reasonable limit on the right to freedom of expression); *R. v. Triumbari* (1988), 42 C.C.C. (3d) 481 (Ont. C.A.) (Whether use of certified copy of documents from Registrar of Motor Vehicles to prove defendant's licence suspension contrary to the principles of fundamental justice and the right to a fair trial).

Chapter Seven

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

7. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

7.1 *Enforcement of Rights*

7.1.1 **Generally**

A defendant whose rights or freedoms under the *Charter* have been breached may be granted a remedy under section 24. Section 24 of the *Charter* provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

7.1.2 **Notice**

A defendant who seeks relief under the *Charter* must satisfy notice requirements prescribed by the *Courts of Justice Act (CJA)*.¹⁰³⁴ Pursuant to section 109(1) of the *CJA*,¹⁰³⁵ a defendant who wishes to:

- challenge the constitutional validity of an Act of Parliament or the Legislature, or a regulation or by-law made under the Act;
- challenge the constitutional validity of a rule or principle of law applicable to criminal or quasi-criminal proceedings; or
- claim a remedy under subsection 24(1) of the *Charter*,

must serve a notice of constitutional question to the Attorney General of Canada and the Attorney General of Ontario.¹⁰³⁶ All parties to the proceedings, including the prosecutor, must also receive a copy of the notice.

¹⁰³⁴ Courts of Justice Act, R.S.O. 1990, c.C.43.

¹⁰³⁵ See also s. 95 CJA, which provides that s. 109 CJA applies to proceedings under the *Provincial Offences Act*.

¹⁰³⁶ Form 4F, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The notice should set out the nature of the alleged *Charter* violation, and the material facts in support. Any materials to be relied upon in support of the application should be served with the notice.¹⁰³⁷ The Court may decline to hear the motion if the defendant is unable to articulate a sufficient foundation in support of the alleged *Charter* breach.¹⁰³⁸

The notice of constitutional question must be filed at least 15 days before the application is to be heard, unless the court orders otherwise.¹⁰³⁹ If the defendant fails to give the notice required by s. 109(1) *CJA*, s. 109(2) *CJA* provides that “the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted as the case may be.”

Given the clear language of section 109(2) *CJA*, both the court and the prosecutor are entitled to demand strict compliance with the notice requirements of the *CJA*. However, the Provincial Offences Court has the discretion to entertain an application for *Charter* relief notwithstanding the defendant’s failure to provide notice.¹⁰⁴⁰ In the context of proceedings commenced by way of certificate of offence, where the majority of defendants are unrepresented, procedural requirements should not prevent a defendant whose constitutional rights have been infringed from being granted relief.¹⁰⁴¹ As noted in *R. v. Jamieson*, “[t]he *Provincial Offences Act* is not intended to be a trap for the unskilled or the unwary but is an inexpensive and efficient way of dealing with, for the most part, minor offences.”¹⁰⁴² An unrepresented defendant in provincial offences proceedings may not be familiar with the procedure to be followed to obtain *Charter* relief, let alone whether his or her *Charter* rights have been infringed.¹⁰⁴³ Accordingly, the court may entertain an application for *Charter* relief in the absence of notice.

7.1.3 Forum

Pursuant to s. 24(1) of the *Charter*, a defendant who seeks a remedy for a violation of his *Charter* rights must apply to a “court of competent jurisdiction.” A court is a court of competent jurisdiction under s. 24(1) *Charter* where it has jurisdiction over:

¹⁰³⁷ *R. v. Franklin* (1991), 66 C.C.C. (3d) 114 at 121 (Ont. C.A.).

¹⁰³⁸ *R. v. Durette* (1992), 72 C.C.C. (3d) 421 at 436 (S.C.C.).

¹⁰³⁹ Subsection 109(2.2) *Courts of Justice Act*.

¹⁰⁴⁰ *Ontario (Worker's Compensation Board) v. Mandelbaum, Spergel* (1993), 61 O.A.C. 361, 12 O.R. (3d) 385, where failure to serve the Attorney General did not render the proceedings a nullity where no prejudice was shown; *R. v. Bellomo* (1995), 14 M.V.R. (3d) 63 (Ont. Ct. (Prov. Div.)) where the defendant was permitted to raise a constitutional issue for the first time on appeal without prior notice. But see *Eaton v. Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.), where Sopinka J. stated in *obiter* that s. 109 *CJA* creates a mandatory notice requirement, and a demonstration of prejudice is irrelevant.

¹⁰⁴¹ See *R. v. Loewen* (1997), 122 C.C.C. (3d) 198 at 206-208 (Man. C.A.).

¹⁰⁴² *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at 552 (Ont. C.A.) (in Chambers); *aff'd* (1982), 66 C.C.C. (2d) 576n (Ont. C.A.).

¹⁰⁴³ See *R. v. Bellomo* (1995), 14 M.V.R. (3d) 63 (Ont. Ct. (Prov. Div.)).

- the parties;
- the subject matter; and
- the order sought.¹⁰⁴⁴

The Provincial Offences Court is a court of competent jurisdiction for the purposes of s. 24(1) *Charter*.¹⁰⁴⁵ Section 29(1) *POA* provides that a hearing in respect of an offence shall be heard and determined by the Ontario Court of Justice sitting in the county or district in which the offence occurred. Accordingly, a defendant charged with an offence proceeded with under the *POA* who alleges that his *Charter* rights have been infringed must apply to the *POA* trial court for relief.¹⁰⁴⁶

A superior court is always a court of competent jurisdiction for the purpose of *Charter* relief.¹⁰⁴⁷ However, as a general rule, the trial court is the preferred court to deal with an alleged *Charter* breach,¹⁰⁴⁸ because it is familiar with the background of the case and may receive *viva voce* evidence on the application. In contrast, courts engaged in appellate review are restricted to affidavit evidence.¹⁰⁴⁹ Therefore, when the Superior Court is not the trial court, but rather is reviewing matters from the courts below, it may not be the preferred forum for the determination of *Charter* issues. Furthermore, determination of *Charter* issues by the court of first instance, along with the merits of the case, avoids the risk of delay, fragmentation of the trial process and the multiplicity of proceedings,¹⁰⁵⁰ and ensures that the issue is determined on the basis of an adequate record.¹⁰⁵¹ Accordingly, a superior court should ordinarily decline to entertain an application for *Charter* relief brought while proceedings in the provincial court are still underway or pending unless, given the nature of the violation or other circumstances, the superior court is better suited to determine the application.¹⁰⁵²

7.1.4 Onus

The defendant has the onus of adducing evidence and establishing, on a balance of

¹⁰⁴⁴ *R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.); *National Parole Board v. Mooring* (1996), 104 C.C.C. (3d) 97 (S.C.C.).

¹⁰⁴⁵ *R. v. Giagnocavo* (1995), 99 C.C.C. (3d) 493 (Ont. C.A.).

¹⁰⁴⁶ *R. v. Giagnocavo* (1995), 99 C.C.C. (3d) 383 (Ont. C.A.); *R. v. Eton Construction Co.* (1996), 106 C.C.C. (3d) 21 (Ont. C.A.).

¹⁰⁴⁷ *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 at 299 (S.C.C.).

¹⁰⁴⁸ *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at 516-520 *per* Lamer J., 569-570 *per* LaForest J. (S.C.C.); *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 104 (S.C.C.).

¹⁰⁴⁹ *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 104 (S.C.C.).

¹⁰⁵⁰ *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.); *R. v. Eton Construction Co.* (1996), 106 C.C.C. (3d) 21 at 24 (Ont. C.A.).

¹⁰⁵¹ *R. v. Eton Construction Co.* (1996), 106 C.C.C. (3d) 21 at 24-25 (Ont. C.A.).

¹⁰⁵² *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 at 299 (S.C.C.); *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 104-105 (S.C.C.).

probabilities, that his or her *Charter* rights have been violated.¹⁰⁵³

7.2 Disclosure

7.2.1 Generally

The defendant has the right to make full answer and defence pursuant to both the common law and *The Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to make full answer and defence is a principle of fundamental justice constitutionally protected by s. 7 of the *Charter*.¹⁰⁵⁴ It was observed by Sopinka J. in *R. v. Stinchcombe* that, “[t]he right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.”¹⁰⁵⁵ The right to disclosure is a component of the right to make full answer and defence.¹⁰⁵⁶ The failure to provide a defendant with full disclosure may impede the defendant’s ability to make full answer and defence,¹⁰⁵⁷ which in turn may deprive the defendant of a fair trial.

7.2.2 The Duty to Disclose

The prosecutor has a duty, before, during and after trial, to disclose all material in his or her possession¹⁰⁵⁸ that is relevant to the defendant’s case, except for material that is privileged.¹⁰⁵⁹ The duty extends to both inculpatory and exculpatory evidence: the prosecutor must disclose evidence that he or she intends to use at trial, and especially all evidence that may assist the defendant in making full answer and defence.¹⁰⁶⁰

1053 *R. v. Collins* (1987), 33 C.C.C. (3d) 1 at 13-14 (S.C.C.).

1054 *Dersch v. Canada (Attorney-General)* (1990), 60 C.C.C. (3d) 132 at 140-41 (S.C.C.).

1055 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 9 (S.C.C.).

1056 *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.).

1057 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 9 (S.C.C.).

1058 *R. v. Stinchcombe* (No. 2) (1995), 96 C.C.C. (3d) 318 at 318 (S.C.C.).

1059 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.); *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 11 (S.C.C.). The Prosecutor’s discretion to withhold disclosure on the basis of privilege is discussed in Section 7.2.5.

1060 *R. v. C.(M.H.)* (1989), 46 C.C.C. (3d) 142 at 151 (B.C.C.A.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 11, 14 (S.C.C.); *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 at 233 (S.C.C.).

Material will be relevant and must be disclosed, where it may assist the defendant to make full answer and defence, and there is a “reasonable possibility” that the defendant will find the information useful in meeting the prosecution’s case.¹⁰⁶¹ The focus of the relevance inquiry is upon the “usefulness” of the material to the defendant. This is clear from the following passage from *R. v. Egger*:

One measure of the relevance of information in the Crown’s hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed: *Stinchcombe, supra*, at p. 16. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.¹⁰⁶²

Accordingly, the duty to disclose will be breached where there is a reasonable possibility that the non-disclosed information could have been used in meeting the prosecution’s case, advancing a defence, or making a decision which could have affected the conduct of the defence.¹⁰⁶³

Given the low relevance threshold to be met before material must be disclosed, it is a good practice to err on the side of full disclosure.

An additional factor which underlies the duty to disclose is the prosecutor’s role as minister of justice. The duty to disclose inherent in the role of minister of justice was discussed in *R. v. Stinchcombe*:¹⁰⁶⁴

[T]he fruits of an investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution.

It is apparent from the preceding passage that timely and full disclosure benefits not only the defendant, but also the administration of justice as a whole. In addition to society’s interest in ensuring that only those guilty of an offence are convicted, full disclosure leads to the efficient use of court time through the resolution of non-contentious issues prior to the trial date, and the early resolution of cases through guilty pleas or withdrawals of

1061 *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 at 236 (S.C.C.).

1062 *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 204 (S.C.C.).

1063 *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 12 (S.C.C.).

1064 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

charges.¹⁰⁶⁵

The duty of full disclosure applies to indictable, summary conviction, regulatory¹⁰⁶⁶ and provincial offences.¹⁰⁶⁷ However the duty to disclose in the provincial offences context may be of a more limited nature, and many of the aspects of the duty to disclose may not apply or apply with less impact.¹⁰⁶⁸

An appreciation of the differences between criminal offences, and provincial offences has informed the Attorney General's policy regarding disclosure in provincial offence prosecutions. Paragraph 21 of the Ministry of the Attorney General's *Policy on Disclosure*¹⁰⁶⁹ provides the following:

21. In Provincial Offence prosecutions, upon request, the defendant in a minor part one offence will be provided with a copy of the certificate of offence and a copy of the notes of the police officer and witnesses if any.

For more serious part one offences, upon request, the defendant will be provided with the above plus a copy of any accident reports or other documents to be utilized in the prosecution.

Accordingly, in the context of a prosecution commenced by way of certificate of offence, the prosecutor's duty to disclose is triggered by a request from the defendant for disclosure. Once a request is made, the prosecutor must disclose all material relevant to the case that is not subject to privilege.

7.2.3 Police Duty to Disclose

The duty to disclose extends to the police. The duty of the Crown to make full disclosure obliges the Crown to obtain from the police all relevant information and material concerning the case. The police have a corresponding duty to provide the Crown with the fruits of its investigation to enable the Crown to meet its constitutionally mandated duty.¹⁰⁷⁰

1065 Ontario (Ministry of the Attorney General), "Policy D-1: Disclosure", *Crown Policy Manual*.

1066 *R. v. NBIP Forest Products Inc.* (1994), 146 N.B.R. (2d) 276 (Q.B.).

1067 *R. v. Vanbots Construction Corp.*, [1996] O.J. No. 347 (Ont. Ct. (Prov. Div.)) [Q.L.].

1068 *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13 (S.C.C.); *R. v. Vanbots*, *supra* at para 15.

1069 Ontario (Ministry of the Attorney General), "Policy D-1: Disclosure", *Crown Policy Manual*.

1070 *R. v. T.(L.A.)* (1993), 84 C.C.C. (3d) 90 at 94 (Ont. C.A.); *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

7.2.4 The Defendant's Right to Disclosure

As noted above, the right to disclosure is a component of the right to make full answer and defence.¹⁰⁷¹ The duty resting upon the prosecutor to disclose gives rise to a corresponding constitutional right of the defendant to disclosure of all relevant material. This is true notwithstanding that disclosure is not explicitly listed in s. 7 *Charter* as one of the principles of fundamental justice.¹⁰⁷² The nature of the defendant's constitutional right to disclosure was discussed in *R. v. Carosella*:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.¹⁰⁷³

While a defendant has a constitutional right to disclosure, this right does not include, in the context of proceedings commenced by way of certificate of offence, the right to be informed of the availability of disclosure. The defendant must make a request for disclosure before it will be provided. This conclusion is reached for the following reasons. First, even in the context of criminal proceedings, the obligation to inform an unrepresented defendant of his or her right to disclosure is qualified.¹⁰⁷⁴ Second, *Stinchcombe* specifically indicates that the duty to disclose in provincial offence prosecutions may be of a more limited nature.¹⁰⁷⁵ Finally, informing unrepresented defendants of the availability of disclosure may be perceived as providing legal advice, which prosecutors should avoid. These observations have informed the Ministry of the Attorney General's policy regarding disclosure in POA prosecutions, which provides that defendants are to be provided with disclosure, *upon request* only.¹⁰⁷⁶

¹⁰⁷¹ *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 306 (S.C.C.).

¹⁰⁷² *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 306 (S.C.C.).

¹⁰⁷³ *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 306 (S.C.C.).

¹⁰⁷⁴ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13-14 (S.C.C.); *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 528-529 (C.A.). In criminal proceedings, the Crown has a general obligation to inform an unrepresented accused of his or her right to disclosure, and the trial justice should not accept a guilty plea from an unrepresented accused without first ensuring that the accused has been informed of his or her disclosure rights. However, where the accused insists upon pleading guilty at his or her first appearance without having received disclosure the Crown's duty to disclose is not breached; *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 at 528-529 (Ont. C.A.). Moreover, it is important to note that if the undisclosed materials are immaterial, i.e. they do not raise a doubt regarding the validity of the guilty plea or provide an evidentiary basis for any potential defence, the right to make full answer and defence is not impaired by the non-disclosure, nor by the taking of a guilty plea without informing the accused of his or her disclosure rights: *T.(R.)*, *supra*, at 528-529; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40 (S.C.C.).

¹⁰⁷⁵ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 13 (S.C.C.).

¹⁰⁷⁶ Ontario (Ministry of the Attorney General), "Policy D-1: Disclosure", *Crown Policy Manual*.

7.2.5 Prosecutorial Discretion to Delay or Withhold Disclosure

The prosecutor does not have an absolute duty to disclose. On the contrary, the prosecutor has the discretion to delay or withhold disclosure in certain circumstances. These circumstances are:¹⁰⁷⁷

- (1) **Privilege.** The prosecutor may withhold disclosure if disclosure would violate the law of privilege. However, a trial justice may order disclosure in spite of any privilege asserted where the recognition of an existing privilege does not constitute a reasonable limit on the right to make full answer and defence.
- (2) **To protect the identity of informers or witnesses.** The prosecutor may delay disclosure of the identity of potential witnesses if such disclosure may result in prejudice or harm to the witnesses.
- (3) **Relevance.** The prosecutor need not disclose what is clearly irrelevant to the charge against the defendant. However, the prosecutor should err on the side of disclosing.
- (4) **To complete an investigation.** Situations may arise where early disclosure may impede the completion of an investigation. Delayed disclosure on this ground should be rare.

It is apparent that not all of the bases for delayed or non-disclosure are applicable to proceedings commenced by way of certificate of offence. In particular, a provincial prosecutor will rarely, if ever, have to argue that delayed disclosure is necessary to protect the identity of witnesses or to allow the police to complete an investigation. Privilege and relevance are the most common grounds advanced to justify delayed disclosure or non-disclosure in Part I proceedings.

7.2.6 Remedies for Non-Disclosure

a. Generally

Where a defendant establishes that his or her right to disclosure has been violated, he or she may be entitled to a remedy under s. 24(1) of the *Charter*. Whether the defendant will be entitled to a remedy, and the nature of the remedy ordered, is influenced by the nature of the material not disclosed, the degree of prejudice occasioned by the lack of disclosure, and the stage of proceedings at which the violation is determined.

¹⁰⁷⁷ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 11 (S.C.C.).

In general, a remedy for non-disclosure ought to be responsive to the particular violation under review. Remedies for non-disclosure should not be crafted to discipline the prosecution or the police.¹⁰⁷⁸

When crafting a remedy, factors that may be considered by the trial justice include:¹⁰⁷⁹

- the nature of the charge;
- delay;
- adjournments to date;
- nature of the evidence not disclosed; and
- explanation for non-disclosure.

Of these factors, the nature of the evidence not disclosed is most significant. Where the evidence is found to be immaterial to the defendant's ability to make full answer and defence, section 7 of the *Charter* is not violated by its non-disclosure.¹⁰⁸⁰

b. Remedies Available at Trial

As noted in Section 7.2.2, a violation of the defendant's right to disclosure is established where it is demonstrated that there is a reasonable possibility the undisclosed materials could have been used by the defendant to meet the case for the prosecution, advance a defence or otherwise make a decision which could have affected the conduct of the defence.¹⁰⁸¹

Where non-disclosed material is brought to the attention of the trial justice, it is incumbent upon the trial justice to consider the material to determine whether it is relevant and therefore should have been disclosed. If the material should have been disclosed, the appropriate remedy in almost all cases will be a disclosure order combined with an adjournment to allow the defendant time to review the materials.¹⁰⁸²

In extreme cases, a stay of proceedings may be granted. A stay for a violation of s. 7

¹⁰⁷⁸ *R. v. Douglas* (1991), 5 O.R. (3d) 29 at 31 (C.A.), aff'd [1993] 1 S.C.R. 893; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40 (S.C.C.).

¹⁰⁷⁹ *R. v. Haynes* (1993), 349 A.P.R. 161 at 164 (N.S.S.C.), aff'd (1994), 4 M.V.R. (3d) 317 (N.S.C.A.).

¹⁰⁸⁰ *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40 (S.C.C.).

¹⁰⁸¹ *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 12 (S.C.C.).

¹⁰⁸² *R. v. Douglas* (1991), 5 O.R. (3d) 29 at 31 (C.A.), aff'd [1993] 1 S.C.R. 893; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 43 (S.C.C.); *R. v. Wicksted* (1996), 106 C.C.C. (3d) 385 at 398-99 (Ont. C.A.), aff'd (1997), 113 C.C.C. (3d) 318 (S.C.C.); *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 15 (S.C.C.). In *Douglas*, a successful Crown appeal from a stay of proceedings, where defence counsel conceded that disclosure one day before trial would have been appropriate, it was held that "an adjournment of sufficient length to permit the [defendant] to review the disclosure documentation would have been appropriate".

Charter will be granted only in the clearest of cases.¹⁰⁸³ A stay for non-disclosure is a remedy of last resort, available where all other acceptable means have been exhausted or are insufficient to remedy the prejudice caused to the defendant's right to full answer and defence.

Additionally, the court should consider whether the prosecution's failure to disclose prejudices the integrity of the judicial system. A violation of the fundamental principles underlying the community's sense of decency and fair play may cause irreparable prejudice to the judicial system,¹⁰⁸⁴ necessitating a stay.

Accordingly, a stay is an appropriate remedy where:

- the prejudice caused by the non-disclosure will be manifested, perpetuated or aggravated through the conduct of the trial, or its outcome; and
- no other remedy is reasonably capable of removing the prejudice.

Other remedies include exclusion of the non-disclosed evidence,¹⁰⁸⁵ curtailment of cross-examination on the non-disclosed evidence,¹⁰⁸⁶ re-opening of cross-examination of prosecution witnesses,¹⁰⁸⁷ or recalling defence witnesses.¹⁰⁸⁸ In addition, a mistrial may be ordered where the prejudice that results from the failure to disclose is so great that it can not be said with certainty that the defendant received a fair trial.¹⁰⁸⁹ The necessity for a mistrial will rarely be demonstrated. Remedies short of ordering a new trial are often more appropriate and desirable.

c. Remedies Available on Appeal

Following conviction, there are only two remedies which may be granted where the defendant/appellant establishes that his or her right to disclosure was violated at trial: a new trial or a stay of proceedings.

Following conviction, the onus upon a defendant who seeks a remedy for non-disclosure of evidence is greater than at trial. At the appellate stage, the focus is upon whether the failure to disclose impaired the defendant's right to make full answer and defence.¹⁰⁹⁰ As

1083 *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 43 (S.C.C.); *R. v. Wicksted* (1996), 106 C.C.C. (3d) 385 at 398-99 (Ont. C.A.).

1084 *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 42 (S.C.C.).

1085 *R. v. Haynes* (1993), 349 A.P.R. 161 (N.S.S.C.), aff'd (1994), 4 M.V.R. (3d) 317 (N.S.C.A.).

1086 *R. v. Welch*, [1993] O.J. No. 3394 (Ont. Ct. (Gen.Div.)) [Q.L.] at para.10.

1087 *R. v. Pizzardi* (1994), 17 O.R. (3d) 623 (Ont. C.A.).

1088 *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 41 (S.C.C.).

1089 *R. v. T.(L.A.)* (1993), 84 C.C.C. (3d) 90 at 94 (Ont. C.A.).

1090 *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 15 (S.C.C.).

observed by Cory J. in *R. v. Dixon*, “[t]he right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation.”

The test to be met by a defendant who seeks a remedy on appeal as a result of the prosecutor’s failure to disclose was established in *R. v. Dixon*.¹⁰⁹¹ The test was summarized by Rosenberg J.A. in *R. v. Babinski* as follows:¹⁰⁹²

The appellant must demonstrate a violation of his right to disclosure by showing that there is a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision that could have affected the conduct of the defence.

The appellant must demonstrate on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose by showing that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. This involves a two-step analysis in the appellate court:

If the appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction a new trial should be ordered.

Even if the evidence on its face does not affect the reliability of the conviction, the appellate court must consider the overall fairness of the trial process. This will require the court to assess, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to gather additional evidence that could have been available to the defence had the information been disclosed. In considering the overall fairness of the trial process, the court will take into account defence counsel’s diligence in pursuing disclosure from the Crown. A lack of due diligence is a significant factor in determining whether the non-disclosure affected the fairness of the trial process.

If the defendant establishes, on a balance of probabilities,¹⁰⁹³ that his or her right to make full answer and defence was impaired by the failure to disclose, the appropriate remedy depends upon the degree of impairment. Once it is shown that there is a reasonable possibility the failure to disclose affected the reliability of the verdict, or the fairness of the

¹⁰⁹¹ *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.).

¹⁰⁹² *R. v. Babinski* (1999), O.J. No. 1407 (C.A.) (Q.L.).

¹⁰⁹³ *R. v. Collins* (1987), 33 C.C.C. (3d) 1 at 13-14 (S.C.C.); *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 16 (S.C.C.).

process, the defendant is entitled to a new trial.¹⁰⁹⁴

Where the defendant seeks a stay of proceedings, he or she must establish not only that the right to make full answer and defence was impaired, “but must also demonstrate irreparable prejudice to that right.”¹⁰⁹⁵

7.3 Right to be Tried Within a Reasonable Time – Section 11(b) Charter

7.3.1 Generally

Pursuant to s. 11(b) of the *Charter*, every person charged with an offence has the right to be tried within a reasonable time.

A person for the purpose of s. 11(b) includes a corporation.¹⁰⁹⁶ A person is charged with an offence, and thus able to benefit from the right to be tried in a reasonable time, “when a formal written complaint has been made against the defendant and the prosecution initiated.”¹⁰⁹⁷

Provincial regulatory offences are included within the meaning of “offence” in s. 11 of the *Charter*.¹⁰⁹⁸ In determining whether proceedings are criminal in nature, the focus is not upon the nature of the act which gave rise to the proceedings. Rather, the focus is upon the nature of the proceedings themselves.¹⁰⁹⁹ A person is charged with an offence within the scope of s. 11 if either: (a) the proceedings in which the conviction was entered were, by their very nature, criminal or quasi-criminal proceedings; or (b) if the punishment imposed involves the imposition of true penal consequences.¹¹⁰⁰ Accordingly, a defendant in proceedings commenced by way of certificate of offence is entitled to a trial within a reasonable time.¹¹⁰¹

¹⁰⁹⁴ *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 17 (S.C.C.).

¹⁰⁹⁵ *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 40, 43 (S.C.C.); *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 310-311 (S.C.C.).

¹⁰⁹⁶ *R. v. C.I.P. Inc.* (1989), 71 C.C.C. (3d) 129 at 141 (S.C.C.).

¹⁰⁹⁷ *R. v. Chabot* (1980), 55 C.C.C. (2d) 385 at 401 (S.C.C.); see also *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.): “[A] person is “charged with an offence” within the meaning of s. 11 of the *Charter* when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn.”

¹⁰⁹⁸ *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 at 397 (S.C.C.). See also *R. v. C.I.P. Inc.* (1989), 71 C.C.C. (3d) 129 (S.C.C.).

¹⁰⁹⁹ *R. v. Shubley* (1990), 52 C.C.C. (3d) 481 at 493 (S.C.C.).

¹¹⁰⁰ *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 at 400 (S.C.C.).

¹¹⁰¹ See *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 at 401 *per* Wilson J., (S.C.C.): “In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11. It falls within s. 11 because of the kind of matter it is.”

7.3.2 The Interests Protected by Section 11(b)

Section 11(b) of the *Charter* protects both the individual rights of the defendant and the interests of society at large.

The primary purpose of s.11(b) is to protect the individual rights of the defendant. These rights are: the right to security of the person, the right to liberty and the right to a fair trial.¹¹⁰² In *R. v. Morin*, Sopinka J. discussed how a defendant's rights are affected by unreasonable delay:

The right to security of the person is protected in s.11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.¹¹⁰³

The secondary purpose of s.11(b) is to ensure that the rights of society as a whole are protected. Both society and an individual defendant have a shared interest in ensuring that the defendant's rights to a fair trial are respected. However, society has an additional interest in ensuring that those who disobey the law are charged, brought to trial and have their matter disposed of on its merits.¹¹⁰⁴ The tension between these competing interests requires the court to engage in a balancing exercise to determine whether a defendant's right to trial within a reasonable time has been infringed.

7.3.3 The Test for Unreasonable Delay

To determine whether there has been unreasonable delay, the following factors are to be considered:

1. length of the delay;
2. waiver of time periods;
3. the reason(s) for the delay, including;
 - inherent time requirements of the case;

¹¹⁰² *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 12 (S.C.C.). See also *R. v. C.I.P. Inc.* (1989), 71 C.C.C. (3d) 129 at 139 (S.C.C.).

¹¹⁰³ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 12 (S.C.C.).

¹¹⁰⁴ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 474 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 495-496 (S.C.C.).

- actions of the accused/defendant;
- actions of the Crown/prosecution;
- systemic or institutional delay;
- other reasons for the delay; and

4. prejudice to the defendant.¹¹⁰⁵

It is important to note that a s. 11(b) analysis should not proceed in a “piecemeal”¹¹⁰⁶ or “mechanical manner.”¹¹⁰⁷ The focus of the inquiry is the reasonableness, or unreasonableness, of the overall delay.¹¹⁰⁸ As observed by Arbour J.A. (as she then was) in *R. v. Bennett*, “it is the reasonableness of the total period of time that has to be assessed, in the light of the reasons that explain its constituent parts.”¹¹⁰⁹ Accordingly, it does not follow that a defendant’s s. 11(b) right is breached simply because the delay attributable to one part of the proceedings is unreasonable, if the total period of delay is itself reasonable.¹¹¹⁰ Conversely, although the period of delay attributable to each individual period, in isolation from the others, may be reasonable, the overall period of delay may nevertheless be unreasonable.¹¹¹¹

Ultimately, the observation of Lamer J. (as he then was) in *R. v. Mills* that “[r]easonableness is an elusive concept which cannot be juridically defined with precision and certainty,”¹¹¹² should be kept in mind when embarking upon a s. 11(b) inquiry. While the factors listed above, if present, must be considered, they are not the only factors that may be relevant in determining whether the period of delay is reasonable. Moreover, care should be taken to avoid over emphasis of any one factor.

a. The Length of the Delay

As a preliminary matter, a s. 11(b) inquiry is unnecessary unless the period of delay is “sufficiently great to raise the issue” of whether the defendant’s right to trial in a reasonable time has been prejudiced.¹¹¹³

1105 *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 105-107 (S.C.C.), *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 13 (S.C.C.).

1106 *R. v. Conway* (1989), 49 C.C.C. (3d) 289 at 307 (S.C.C.).

1107 *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 499 (S.C.C.).

1108 *R. v. Conway* (1989), 49 C.C.C. (3d) 289 at 307 (S.C.C.).

1109 *R. v. Bennett* (1991), 64 C.C.C. (3d) 449 at 467 (Ont. C.A.), aff’d (1992), 74 C.C.C. (3d) 384n (S.C.C.).

1110 *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 345-346 (Ont. C.A.), aff’d (1997), 119 C.C.C. (3d) 1 (S.C.C.).

1111 *R. v. Conway* (1989), 49 C.C.C. (3d) 289 at 307 (S.C.C.).

1112 *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at 541 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 499 (S.C.C.).

1113 *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 500 (S.C.C.).

The relevant time period for the purposes of a s.11(b) inquiry is the period between the commencement of proceedings,¹¹¹⁴ i.e. laying of the information or certificate of offence, and the final disposition of the matter,¹¹¹⁵ up to and including sentencing.¹¹¹⁶ Note, however, that the length of the trial itself, or the period of time between the commencement of the trial and the verdict, is not considered unless the overall period of time is unreasonable.¹¹¹⁷

Pre-charge delay is not considered.¹¹¹⁸ Similarly, appellate delay is not considered.¹¹¹⁹ Once a person has been convicted or acquitted of an offence, that person ceases to be a person charged with an offence for the purposes of s. 11(b).

b. Waiver of Time Periods

The period of delay, that is, the period between the commencement of proceedings and the final disposition of the case, is reduced by subtracting periods of delay explicitly or implicitly waived by the defendant.¹¹²⁰ Any waiver must be clear and unequivocal, with full knowledge of the rights that s.11(b) is designed to protect and the effect of waiver on s.11(b) rights.¹¹²¹

The issue of waiver arises where the defendant requests or agrees to an adjournment. In the former situation, the defendant often will explicitly waive his or her 11(b) right in order to secure an adjournment. In the latter situation, the defendant's consent to an adjournment may amount to an implicit waiver of his or her 11(b) right. Indeed, the agreement of a defendant to a future trial date gives rise to an inference that the defendant has waived his or her right to allege that there has been an unreasonable delay.¹¹²² However, where consent to a trial date amounts to mere acquiescence in the inevitable, no waiver will be found.¹¹²³

1114 *R. v. Chabot* (1980), 55 C.C.C. (2d) 385 at 401 (S.C.C.); *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 at 470-471 (S.C.C.).

1115 *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 at 470-471 (S.C.C.).

1116 *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 492-493 (S.C.C.).

1117 *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), *aff'd* (1997), 119 C.C.C. (3d) 1 (S.C.C.).

1118 *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 at 470-471 (S.C.C.).

1119 *R. v. Potvin* (1993), 83 C.C.C. (3d) 97 (S.C.C.).

1120 *R. v. Monn* (1992), 71 C.C.C. (3d) 1 at 15 (S.C.C.).

1121 *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at 217-19 (S.C.C.); *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 481-82 (S.C.C.).

1122 *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 109 (S.C.C.).

1123 *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 15 (S.C.C.); *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.); *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.). See also *R. v. Franklin* (1991), 66 C.C.C. (3d) 114 (Ont. C.A.), where it was held that the failure to ask for an earlier date in open court cannot constitute waiver where the defendant was advised by the Crown that the trial date was the earliest date available.

c. Reason(s) for the Delay

The period of delay that remains after subtracting periods that have been waived is examined by the court to determine whether the delay is unreasonable. The court will divide the total period of delay into segments, determine whether the cause of the delay for the individual segment is attributable to inherent time requirements of the case, actions of the defendant, actions of the prosecution, or systemic delay, and determine whether the delay is reasonable. This examination involves a balancing of the explanation for the delay and the prejudice to the defendant.

(i) Inherent Time Requirements of the Case

Inherent time requirements are those requirements that must necessarily be met in order to process a case from beginning to end, assuming the availability of adequate institutional resources.¹¹²⁴ In the apportionment of the blame exercise implicit in a s.11(b) inquiry, delay due to inherent time requirements is not attributable to either the defence or the prosecution, and is therefore reasonable.¹¹²⁵

The most obvious inherent time requirements are intake requirements. Intake requirements include retention of counsel or an agent, first attendance, police and administration paperwork, and disclosure.¹¹²⁶

The complexity of the case may present an additional inherent time requirement. Counsel require more time to prepare for a complex case, and trials of complex matters take longer to complete. In general, the more complicated a case, the greater the period of excusable delay.

Local practices and conditions may also influence the amount of time attributable to the inherent time requirements of a case.

(ii) Actions of the Defendant

All voluntary actions of the defendant that contribute to the overall time are deducted from the period of delay which the defendant alleges is unreasonable.¹¹²⁷ Actions of the defendant which contribute to delay are inconsistent with a desire to proceed to trial, and

1124 *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 348 (Ont. C.A.), aff'd (1997), 119 C.C.C. (3d) 1 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 500 (S.C.C.).

1125 *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 348 (Ont. C.A.), aff'd (1997), 119 C.C.C. (3d) 1 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 500 (S.C.C.).

1126 *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 16-17 (S.C.C.).

1127 *R. v. Conway* (1989), 49 C.C.C. (3d) 289 at 306 (S.C.C.).

therefore are inconsistent with a claim that his or her s. 11(b) right has been infringed.¹¹²⁸ It must be remembered that society has an interest in preventing a defendant from using s. 11(b) as a means of escaping trial.¹¹²⁹

The most common defence action that leads to delay is a defence request for an adjournment. An important caveat is the situation where the defendant requests and is granted an adjournment because he or she has been provided with disclosure on the day set for trial. In this or similar situations, *i.e.* where the defendant is forced to ask for an adjournment as a result of the prosecutor's action or inaction, the resulting delay is attributable to the prosecution although the adjournment was granted at the defendant's request.

(iii) Actions of the Prosecution

It is the duty of the prosecution to bring the defendant to trial.¹¹³⁰ This includes the duty to ensure that trial proceedings, once commenced, are not unduly delayed.¹¹³¹ The prosecution cannot rely on any delay attributable to their own actions to explain away delay which is otherwise unreasonable.¹¹³²

Typical actions of the prosecution which lead to delay include delayed or incomplete disclosure and requests for adjournments to allow for the attendance of the officer in charge¹¹³³ or prosecution witnesses.

(iv) Systemic or Institutional Delay

Systemic delay, or the period of delay attributable to limits on institutional resources, is that period which starts when the parties are ready for trial but the system can not accommodate them.¹¹³⁴ Institutional delay is the most common source of delay. Only unreasonable systemic delay will be counted against the prosecution.¹¹³⁵ This flows from the appreciation that delays inevitably and unavoidably occur in processing a case.

It was recognized in *R. v. Morin* that the prosecution of offences does not occur in an administrative utopia where the availability of judges, courtrooms and court staff is

¹¹²⁸ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 480-481 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 501 (S.C.C.).

¹¹²⁹ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 480 (S.C.C.).

¹¹³⁰ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 478, 480-82 (S.C.C.).

¹¹³¹ *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 (at 501 S.C.C.).

¹¹³² *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 18 (S.C.C.).

¹¹³³ *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 108 (S.C.C.).

¹¹³⁴ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 18 (S.C.C.).

¹¹³⁵ *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 503 (S.C.C.).

adequate to meet the goal of zero tolerance for institutional delay. The reality is that many regions are faced with rapidly growing populations and limited resources. While the government is constitutionally obliged to commit sufficient resources to prevent unreasonable delay, the court must consider the shortage of available resources at the disposal of the government.¹¹³⁶ However, the chronic failure of the government to provide sufficient courtrooms, prosecutors or judges can not be allowed to legitimize unreasonable periods of delay, and may result in a determination that the defendant's s.11(b) right has been infringed.¹¹³⁷

The solution has been the formulation of an administrative guideline for acceptable institutional delay. For Provincial Courts, the appropriate period of institutional delay is between 8 to 10 months.¹¹³⁸ This period is justified by the number of cases disposed of by Provincial Courts and the resulting demand placed on the courts.

The administrative guideline is not inflexible: it will yield to other factors, which include allowances for particular regions and changing conditions that place a sudden and temporary strain on resources.¹¹³⁹ The aim is not to allow changing circumstances to result in an "amnesty" for persons charged in that region.

Additionally, the absence of prejudice to the defendant increases the amount of institutional delay which the court will accept.¹¹⁴⁰

(v) Other Reasons for the Delay

Other reasons for delay are just that: reasons for delay which do not fit into any of the categories already described. All reasons for delay must be considered and accounted for.

This category of delay cannot be relied upon by the prosecution to justify otherwise unreasonable delay. The typical cause of delay which fits into this category is the action(s) of trial judges.

d. Prejudice to the Defendant

Prejudice to the defendant can be inferred from prolonged delay.¹¹⁴¹ As noted above, it is the duty of the prosecution to bring the defendant to trial. The longer the delay, the

¹¹³⁶ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 18-19 (S.C.C.).

¹¹³⁷ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.); *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at 503 (S.C.C.).

¹¹³⁸ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 21 (S.C.C.).

¹¹³⁹ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 20 (S.C.C.).

¹¹⁴⁰ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 21 (S.C.C.).

¹¹⁴¹ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at 482 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 23 (S.C.C.).

more likely it is that the defendant has been prejudiced.¹¹⁴² However, any action or inaction on the part of the defendant which is “inconsistent with a desire for a timely trial is relevant to the assessment of prejudice.”¹¹⁴³

It was recognized by Sopinka J. in *R. v. Morin* that in many cases a defendant is not interested in a speedy trial and that delay works to the advantage of the defendant.¹¹⁴⁴ For example, a defendant charged with driving while under suspension may want to delay a trial as long as possible to avoid a further suspension of his or her license, and the adverse impact such a suspension would have on his or her ability to drive to work. The purpose of s.11(b) is to expedite trials and minimize prejudice, not to avoid trials on the merits. Consequently, the Court may consider action or inaction of the defendant that is inconsistent with a desire for a speedy trial. Inaction may be relevant to the level of prejudice, if any, experienced by the defendant.

In addition to inferred prejudice, both the defence and the prosecution may adduce evidence to support or dispel a finding of prejudice.

Finally, the degree of prejudice experienced by a defendant is an important factor in the determination of the length of acceptable institutional delay. In general, the lower the prejudice occasioned to the defendant by institutional delay, the greater the period of institutional delay which the court will find is reasonable.

7.3.4 Remedy for Unreasonable Delay

Where the defendant has established that the period of time between the commencement of proceedings and the disposition of the case is unreasonable, the appropriate remedy is a stay of proceedings.¹¹⁴⁵

¹¹⁴² *R. v. Monn* (1992), 71 C.C.C. (3d) 1 at 23 (S.C.C.).

¹¹⁴³ *R. v. Monn* (1992), 71 C.C.C. (3d) 1 at 24 (S.C.C.).

¹¹⁴⁴ *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.).

¹¹⁴⁵ *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.).



Chapter Eight

**FRENCH LANGUAGE
SERVICE RIGHTS**

8. FRENCH LANGUAGE SERVICES RIGHTS

The Courts of Justice Act (CJA) provides that the official languages of the courts in Ontario are English and French.¹¹⁴⁶ Although section 125(2) of the *CJA* provides that hearings shall be conducted in English unless otherwise provided, section 126(1) provides that a party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.¹¹⁴⁷

8.1 Requests for Bilingual Hearings

(a) How to make a Request

Regulation 185 under the *CJA*¹¹⁴⁸ governs the procedure for making a request for a bilingual proceeding under section 126(1) *CJA*. The specific acts required to request a bilingual proceeding will vary based on the type of proceeding and the level of court.

In a provincial offences proceeding in the Ontario Court of Justice, a party to the proceeding may request a bilingual proceeding by:

- filing a requisition in Form 1 with the clerk where the proceeding was commenced.¹¹⁴⁹
- making a written or oral statement to the court during a court appearance;
- filing a written statement with the clerk where the proceeding was commenced; and
- filing their application or answer in French.

However, it should be noted that where a defendant has been served with an offence notice under Part I, or a notice of parking infraction under Part II, a defendant can request a bilingual proceeding by writing directly on their offence notice or parking infraction, which

¹¹⁴⁶ *Courts of Justice Act*, R.S.O. 1990, c.C.43 s.125 (1).

¹¹⁴⁷ Note: the recent Supreme Court of Canada decision *R. v. Beaulac*, [1999] 1 S.C.R. 768 which considered a similar provision in the Criminal Code. Mr. Justice Bastarache stated that language rights are to be interpreted purposively in a manner consistent with the preservation and development of official language communities in Canada. As a result he interpreted s.530 of the Criminal Code to entitle the defendant to a bilingual trial based on subjective ties to the language and provided such a right will exist regardless of the ability of the accused to speak the other official language.

¹¹⁴⁸ R.R.O. 1990, Reg. 185, as am. O.Reg. 681/92.

¹¹⁴⁹ Reg. 185, s.2(1)(a); Reg. 185, s.2(1)(b)(i); Reg. 185, s.2(1)(b)(ii); Reg. 185, s.2(1)(c).

will serve as the written statement noted above.¹¹⁵⁰

(b) Time Limits

A party making a request for a bilingual proceeding must do so within the time limits set out in Regulation 185. The following time limits will apply where a party requests a bilingual trial in a *POA* matter:

- where a summons is served on a defendant under Parts I or III of the *POA*, at the time the trial date is set;
- where an offence notice is served on a defendant under Part I of the *POA*, at the time the offence notice is delivered to the court; and
- where a notice of parking infraction is served on a defendant under Part II of the *POA*, at the time the notice of parking infraction is delivered to the place specified in the notice.¹¹⁵¹

Once the time limit has expired, the request for a bilingual trial may be filed with leave of the court.¹¹⁵²

(c) Notice to Parties

Where a defendant in a provincial offences proceeding requests a trial by filing a requisition or files a statement, which includes writing directly on the offence notice, the clerk of the court shall notify every other party of the request by ordinary mail.¹¹⁵³

8.1.1 Rules for proceedings – the Courts of Justice Act

Courts of Justice Act and Regulation 185.

Subsection 126(2) paragraphs 1 to 9 of the *CJA* sets out the rules for bilingual proceedings. Paragraphs 1 to 9 provide as follows:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.

¹¹⁵⁰ Reg. 185, s.2(5).

¹¹⁵¹ Reg. 185, s.2(3)(d).

¹¹⁵² Reg. 185, s.2(2)(e).

¹¹⁵³ Reg. 185, s.2(4).

2. If a hearing that the party has specified is held before a judge and jury in a area named in Schedule 1, the jury shall consist of persons who speak English and French.
3. If a hearing that the party has specified is held without a jury, or with a jury in an area named in Schedule 1, evidence given and submissions made in English and French shall be received, recorded and transcribed in the language in which they are given.
4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can so be conducted.
5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it is given.
6. In an area named in Schedule 2, a party may file pleadings and other documents written in French.
7. Elsewhere in Ontario, a party may file pleadings and other documents written in French if the other parties consent.
8. The reasons for a decision may be written in English or French.
9. On the request of a party or counsel who speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraphs 2 and 3 and at examinations out of court, and translation of reasons for a decision written in the other language.

The above noted provisions and the applicable sections of Regulation 185 establish the different procedures to be followed in designated versus non-designated areas of the province where a bilingual proceeding is requested under s.126(2) *CJA*.

The provisions of the *CJA* apply to corporations, partnerships, and sole proprietorships in the same way as they do a natural person.¹¹⁵⁴

(i) Proceedings in areas designated under Schedule 1 and 2¹¹⁵⁵

In an area designated in Schedule 1 a bilingual proceeding will be presided over by a bilingual justice of the peace.

¹¹⁵⁴ *CJA* s 126(8).

¹¹⁵⁵ A list of the areas designated in Schedule 1 and 2 is reproduced below in 8.1.2(c).

Evidence and submissions will be received, recorded and transcribed in the language given. On the request of a party or counsel who speaks English or French but not both, the court shall provide consecutive interpretation of anything given orally and a translation of reasons for a decision written in the other language.

Where a witness in a bilingual proceeding speaks neither English or French they shall be questioned in the language the judge determines is understood by all counsel and the testimony shall be interpreted only into that language.¹¹⁵⁶

Where a party does not understand the language the witness is being questioned in, the court shall provide whispered interpretation to that party.¹¹⁵⁷

Documents can be filed in French in an area named in Schedule 2. The reasons for a decision can be written in English or French.

(ii) Proceedings in non-designated areas

A bilingual proceeding in a non-designated area will be presided over by a bilingual justice of the peace. A party who intends to appear in person to make submission in French or who intends to rely on evidence of a witness to be adduced orally in French must provide at least 10 days written notice. Where evidence or submissions are made in French, the court shall provide interpretation of the evidence or submission into English.

Where a witness in a bilingual proceeding speaks neither English or French, they shall be questioned in the language the judge determines is understood by all counsel and the testimony shall be interpreted only into that language.

Where a party does not understand the language the witness is being questioned in, the court shall provide whispered interpretation to that party.

A party may file pleading and documents in French with the other parties' consent. The reasons for a decision can be written in English or French.

(b) Prosecutor

Subsection 126(2.1) of the *CJA* provides that where a *POA* prosecution by the Crown in Right of Ontario is being conducted as a bilingual proceeding, the prosecutor assigned to the case must be a person who speaks English and French. While there is no similar

¹¹⁵⁶ Reg. 185, s. 8(1).

¹¹⁵⁷ Reg. 185, s. 8(2).

statutory requirement for proceedings prosecuted by municipal employees, the provisions of the agreement entered into under Part X of the *POA* which enable the municipality to perform prosecutorial functions, require the provision of services at the same level provided by the Attorney General.¹¹⁵⁸ Specifically paragraph 5.3.4 of the Memorandum of Understanding provides that a municipality must provide a prosecutor who speaks French and English when a bilingual trial is requested on a charge that is covered by the transfer agreement. Therefore, the requirement to provide a bilingual prosecutor will apply when municipal employees are conducting the prosecutions.¹¹⁵⁹

(c) List of Areas Designated in Schedule 1 and 2 Reg. 185

Schedule 1 – Bilingual Juries

Paragraphs 2 and 3 of subsection 126(2)

The following counties:

Essex

Kent

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

¹¹⁵⁸ See paragraphs 2.1.6, 5.3.4, and Schedule 2 paragraph 2.5 of the *Memorandum of Understanding*.

¹¹⁵⁹ The problem of not having a bilingual prosecutor when dealing with municipal infractions was the subject of judicial criticism in the recent case of *Chevner and Maheux v. The Queen*, (unreported, May 7, 1997) (Ont. Ct. (Prov. Div.)), leave to appeal to the Court of Appeal refused, Dec. 16, 1997).

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Regional Municipality of Hamilton-Wentworth.

The Regional Municipality of Ottawa-Carleton.

The Regional Municipality of Peel.

The Regional Municipality of Sudbury.

The City of Toronto. 1994, c. 12, s. 43(3); 1997, c. 26 Sch.

Schedule 2 – Bilingual Documents

Paragraph 6 of subsection 126(2)

The following counties:

Essex

Kent

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Regional Municipality of Hamilton-Wentworth.

The Regional Municipality of Ottawa-Carleton.

The Regional Municipality of Peel.

The Regional Municipality of Sudbury.

The City of Toronto. 1994, c. 12, s. 43(3); 1997, c. 26 Sch.

8.1.2 Additional Requirements: The *French Language Services Act* and Agreements with Municipalities

(a) General

Other requirements which impact on the level of services to be provided to French speaking defendants are found in the *French Language Services Act (FLSA)*,¹¹⁶⁰ and within the agreements entered into between the Attorney General and Municipalities under Part X of the *POA*.

(b) *French Language Services Act*

The intent of the *French Language Services Act* is to ensure recognition of French as an official language of the court of Ontario and to guarantee the use of the French language in institutions of the Legislature and the Government of Ontario.

The *FLSA* provides that in designated areas, a defendant has the right to conduct their business with government in French.¹¹⁶¹ Section 5(1) states:

5(1) A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

This includes, in designated areas specified, any out of court administrative processes such as making requests for disclosure, or arranging for first attendance appointments with a prosecutor to discuss the case. In these areas, certain court staff areas must be able to speak both English and French.

¹¹⁶⁰ R.S.O. 1990, Ch.F.32

¹¹⁶¹ A list of the designated areas is reproduced in 8.1.3 (d) below

(c) Memorandum of Understanding

Where a municipality has entered into an agreement under Part X of the *POA* to perform prosecutions, paragraphs 2.1.6 and 5.3.3 of the Memorandum of Understanding provide that municipalities must continue to provide out-of-court services in French in designated areas at the same levels that are provided by the Attorney General as prescribed by the *French Language Services Act* R.S.O. 1999, c.F.32.

As a result, although municipalities are specifically excluded from the definition of a government agency under the *French Language Services Act*, the obligations created by that statute have been extended to the municipalities by contract.

(d) List of areas designated under *The French Language Services Act*:**SCHEDULE**

Municipality or District	Area
City of Toronto	All
Regional Municipality of Hamilton-Wentworth	City of Hamilton
Regional Municipality of Niagara	Cities of: Port Colborne and Welland
Regional Municipality of Ottawa-Carleton	All
Regional Municipality of Peel	City of Mississauga
Regional Municipality of Sudbury	All
County of Dundas	Township of Winchester
County of Essex	City of Windsor Towns of: Belle River and Tecumseh Townships of: Anderdon, Colchester North, Maidstone, Sandwich South, Sandwich West, Tilbury North, Tilbury West and Rochester
County of Glengarry	All
County of Kent	Town of Tilbury

	Townships of: Dover and Tilbury East
County of Prescott	All
County of Renfrew	City of Pembroke Townships of: Stratford and Westmeath
County of Russell	All
County of Simcoe	Town of Penetanguishene Townships of: Tiny and Essa
County of Stormont	All
District of Algoma	All
District of Cochrane	All
District of Kenora	Township of Ignace
District of Nipissing	All
District of Sudbury	All
District of Thunder Bay	Towns of: Geraldton, Longlac and Marathon Townships of: Manitouwadge, Beardmore, Nakina and Terrace Bay
District of Timaskaming	All

Chapter Nine

GLOSSARY

9. GLOSSARY

9.1 Definitions

Absolute Liability – Liability without fault or negligence. If the defendant has been charged with an absolute liability offence, the Crown need only prove that the defendant committed the prohibited act, or *actus reus*, to establish guilt. The Crown need not prove that the defendant intended to commit the act, or knew he was committing it.

Abuse of Process – Conduct of the Crown during a prosecution, which is oppressive or vexatious such that it is offensive to the principles of fundamental justice or fair play. An abuse of process usually occurs where a prosecution has been initiated or continued for an ulterior purpose, or a purpose which is different from that which the prosecutorial process was designed to serve.

Actus reus – The voluntary act or omission which results in the prohibited consequence. The physical aspect of the crime which, combined with the *mens rea* (guilty mind), renders the actor criminally liable.

Acquittal – A judicial discharge from prosecution. A defendant will be acquitted if the Crown fails to prove all of the elements of the offence charged beyond a reasonable doubt. An acquittal is commensurate with a finding of “not guilty.”

Administration of Justice – The provision, maintenance, and operation of: (a) the courts of justice of the province; (b) land registry offices; (c) jails; and (d) the offices of coroners and Crown Attorneys, for the performance of their functions, including any functions delegated to such courts, institutions or offices or any official thereof by or under any Act. *Dilorio v. Montreal Jail*, [1978] 1 S.C.R. 152, 73 D.L.R. (3d) 491 at 527 *per* Dickson J.

Admission – A voluntary statement uttered by the defendant against the defendant's interest. An admission is not the same as a sworn statement. Also refers to undisputed facts alleged by the opposing party.

Admission of Service – Acknowledgement by a party that a copy of a document was received by them.

Adversarial System – This is the procedure followed in Canadian courts, whereby opposing parties appear before a neutral arbiter and present the evidence they seek to rely on, and challenge or refute the evidence of their opponent through cross examination of witnesses or presentation of rebuttal evidence.

Affiant – The person who makes an affidavit.

Affidavit – A statement of facts in writing, confirmed by oath or solemn affirmation by the party making it (the “affiant”) before a person authorised by law to administer an oath or affirmation (a “commissioner of oaths”).

Affidavit of Service – An affidavit certifying that a document has been served on a party to the proceeding.

Affirm – To make a solemn and formal declaration that a person will tell the truth, or that the contents of his or her affidavit are true.

Affirmation – A solemn declaration to tell the truth made by a person who objects to the oath. An affirmation has the same effect as an oath.

Agent – A person who acts for another with or without compensation.

Agreed Statement of Facts – A statement of facts relating to the evidence upon which the parties agree and upon which the case will be decided.

Amendment – Correction of an error in either the form or substance of a certificate of offence or summons. An amendment can be made so long as the defendant is not prejudiced in his or her defence nor misled by the amendment (s. 34 *POA*).

Application – A request made to the justice for a particular beneficial result or form of relief.

Appeal – Review by a higher court of the decision of a lower court.

Arraignment – This is the first step in the trial process. The defendant is brought or appears before the court, informed of the charge against him or her, asked how he or she pleads (guilty, guilty with an explanation, or not guilty), and then his or her plea is recorded.

Attendance – Appearing in court and making the justice aware of your presence.

Authority – Authority may have the following meanings:

- a power given by statute or a person to another to perform some acts;
- a person or body authorized by statute to perform some act; or
- a statute, case or text cited in support of an argument or proposition.

Automatism – An unconscious or involuntary state during which a person, although capable of acting, is unaware or not conscious of what he or she is doing. Although a defence, automatism is more accurately described as a condition which negated the defendant's mental capacity to appreciate his or her conduct.

Autrefois Acquit – A defendant may not be prosecuted for an offence that the defendant has previously been tried and **acquitted** of. Where a defendant enters a plea of *autre fois acquit*, the court will look to see whether the defendant was in jeopardy of being convicted of the offence during prior proceedings.

Autrefois Convict – A defendant may not be prosecuted for an offence that the defendant has been tried and **convicted** of.

Bail – To release a defendant after arrest pending trial. In general, a defendant will be released on his or her own undertaking, unless the prosecutor establishes that continued detention is necessary to ensure the defendant's attendance in court.

Bench Warrant – Process or order issued by the court itself for the arrest of a defendant, or a witness who fails to obey a subpoena.

Best Evidence Rule – The best evidence rule directs that the best evidence available ought to be presented rather than inferior or less satisfactory evidence. For example, the original of a document ought to be produced whenever possible.

Binding Authority – The decision or judgment of a higher court, which a lower court must follow.

Bona Fide – In good faith. To be honest, open or sincere. Without deceit or fraud.

Burden of Proof – The obligation or duty to prove a fact in issue to a requisite degree of proof. Provincial offences must be proved to the criminal standard, *i.e.* proof beyond a reasonable doubt.

Causation – Causation is the connection or relationship that must be proved between the act of the defendant and the prohibited consequence to establish liability.

Certificate – A written assurance that some act has or has not been done, or some event has occurred.

Certiorari – The power of a higher court to quash a decision of a lower court on the basis of an error of law or lack of jurisdiction.

Charge – The offence that the defendant is accused of committing.

Common Law – Judge made law as opposed to statutory law. Common law principles and rules derive their authority from usage and custom of the court, which recognize, affirm and enforce the principles and rules. Where there is a conflict between common law and statutory law, statutory law prevails.

Common Law Defence – Defences justify or excuse a defendant's conduct despite proof of the offence. Section 80 of the *POA* provides that all common law defences continue in force except to the extent that they are altered or inconsistent with the *POA* or any other provincial Act. Common law defences include: *de minimis*, impossibility, mistake of law, officially induced error, necessity, insanity and duress.

Competent – Legally allowed to testify. The routine test of competence is the ability to understand the nature of the oath.

Conduct money – Money paid to a witness for expenses incurred for appearing in court.

Contempt of Court – To embarrass, hinder, or obstruct the administration of justice by the court. Commonly a failure to obey the rules or an order of the court.

Corroboration – Evidence which strengthens, bolsters or confirms other evidence adduced in a trial.

Cross-examination – Examination of a witness by the opposing party to test the truth of and limited to the evidence given by the witness during examination-in-chief. Leading questions may be asked during cross-examination.

Curative Provision – A provision in a statute granting authority to cure or correct defects, errors, omissions or irregularities contained in documents such that the matter before the court can be determined on its merits.

Custom – An unwritten rule based on established or long-term practice.

Defence – An assertion of innocence or denial of guilt.

Disposition – Final settlement or sentencing of a case.

Docket – The list of cases to be tried before the court.

Due Diligence – The level of prudence or nature of conduct that is ordinarily exercised by a reasonable and prudent person in the circumstances presented to him or her. Note that the test for due diligence is not purely objective: what constitutes due diligence in a particular case depends upon the circumstances that the defendant was presented with. The defendant must establish that he or she took all reasonable steps to avoid the prohibited event.

Due Process – Administration of justice in accordance with regular procedures recognized by Parliament and the courts.

Duress – A defence where the defendant alleges that he or she committed a crime because they were threatened with serious harm. Duress operates as an excuse or justification of the defendant's conduct.

Equity – "Fairness". Justice administered on the basis of fairness or justness rather than the formal legal rules of the common law or statute. The court has an inherent jurisdiction to grant an equitable remedy to a party where it would be just to do so in the circumstances but no remedy exists at common law or statute.

Error in Law – An error by the court in applying the law to the matter before it. For example, the court errs in law if it misinterprets an applicable statute, or admits evidence that is inadmissible.

Examination-in-chief – Examination of a witness by the party that called him or her. In general, only open questions may be asked of a witness during examination-in-chief, with an exception made for introductory matters (e.g. the witness' personal information).

Excluded Evidence – Evidence which, although otherwise relevant to the matters in issue, is not admitted because it was obtained improperly or in violation of the defendant's constitutional rights.

Excuse – A defence, where the defendant concedes the wrongfulness of his or her conduct, but argues that the prohibited conduct shouldn't be attributed to him or her because of circumstances which affected his or her conduct.

Exhibit – A document or physical item, which is offered to the court for inspection as proof of a fact(s) asserted.

Ex parte – Done for, on behalf of, or on application of one party only, in the absence of the other party. Thus, during an *ex parte* trial, the defendant does not have to be present.

Expert - A witness possessing special knowledge and skill in a particular field going beyond that of the court, who is called to provide information to help the court understand the technical or scientific issues raised in the trial. Expert witnesses, unlike lay witnesses, are allowed to offer opinions and conclusions regarding the facts presented.

Eyewitness – A witness who testifies to facts he or she saw.

Fact – A thing, action, incident or circumstance actually done or completed. A fact is proved through the introduction of evidence, and may be disproved by contradictory evidence. A fact is different from an opinion; the latter being a conclusion based on an interpretation of the facts.

Foreseeable Risk – A risk that a reasonable person would anticipate as being a likely consequence of his or her act or omission. A foreseeable risk is not merely a possibility.

Full Answer and Defence – The constitutional right of a defendant to assert all possible defences, whether based on a technicality or not.

Fundamental Justice – The basic tenets and principles of our legal system which qualify and set the parameters of the constitutional right of an individual not to be deprived of life, liberty and security of the person. Fundamental justice is not susceptible to an exhaustive definition. Sections 8 to 14 of the *Charter of Rights and Freedoms* delineate specific deprivations of life, liberty and security of the person contrary to the rules of fundamental justice. Violations of fundamental justice that are not addressed by ss. 8 to 14 of the *Charter* will be defined on a case by case basis.

Hostile Witness – A witness whose attitude, demeanour and evidence during examination in chief reveals that the witness is hostile or opposed in interest to the party that called him or her. A hostile witness may be cross-examined *i.e.* asked leading

questions by the party calling him or her, with the court's permission.

Inadvertence – An oversight, lack of attention, or carelessness.

In camera – In private. In *camera* proceedings occur with only the judge or justice present. All spectators are excluded from the courtroom.

Included Offence - An offence which is part of the offence charged. The "greater" offence contains all of the elements of the "lesser" offence. For example, proof that a defendant failed to stop for a red light (contrary to s.144(18) POA), is also proof that the same defendant failed to stop for an amber light (contrary to s.144(15) POA), and also failed to obey a lane light (contrary to s.144(10) POA). The latter two offences are included offences of failing to stop for a red light. If all of the elements of the offence charged are not proved, it is proper for a finding of guilt to be entered for an included offence, provided that all of the elements of the included offence were proved beyond a reasonable doubt.

Inducement- Something that persuades or influences certain conduct.

Inference - A deduction or conclusion of fact based on common sense and logic, which is drawn from other facts already proved in the case.

Information - The written accusation against the defendant or charging document. The information sets out the offence that the defendant is charged with, and is read to the defendant upon arraignment.

Irregularity - A defect in the manner of proceedings. Either doing something that does not conform to established rules and practice, or omitting to do something that is necessary for orderly conduct of a proceeding.

Jurisdiction - The power and authority of the court to determine a matter. The court must be duly constituted with power over the subject and parties to the proceedings. Thus, jurisdiction has two meanings:

- a) Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions and declare judgment.
- b) Jurisdiction also defines the geographic area of authority in which the court has power to hear cases, and the types of cases that the court has authority to hear.

Leading Question - A question which suggests the answer to the witness, or allows for only a yes or no answer.

e.g. **Q:** The light was red when Mr. Smith entered the intersection, wasn't it?

A: Yes

Leading questions are permissible during cross-examination. They are usually not allowed during examination in chief of a witness, but may be permissible to elicit introductory information from a witness e.g., a police constable's name, detachment, and the reason the constable was in the area where the traffic violation was observed. Note that leading questions may also be asked during examination in chief to help a young or mentally disabled witness give their evidence, or if a witness has been declared hostile.

Limitation Period - The period during which legal actions can be brought and obligations enforced. Once the limitation period runs out, no legal action can be brought.

Mandamus – “We command.” An order from a higher court to an inferior court commanding the performance of an act. *Mandamus* is available as a remedy where an inferior court refused to take some action it was required to take.

Mens rea - The “guilty mind.” *Mens rea* is the mental element of an offence, which, when combined with the *actus reus*, establishes criminal liability. *Mens rea* can be established through proof of intent, knowledge, recklessness or willful blindness.

Mistake of Fact - A defence. Either an unconscious ignorance or forgetfulness of a material fact, or a belief in the existence of a material fact that does not exist, which leads one to execute a prohibited action. A mistake of fact is distinguished from a mistake of law, the latter being an error regarding the legal effect of known circumstances.

Motion - A request to the court made during the course of a proceeding for an order directing that something be done that affects the proceeding in some way, usually for the benefit of the moving party. A motion is distinguished from an application in that the former is an incidental step to a proceeding, while the latter constitutes a separate proceeding.

Necessity - A defence, or more accurately an excuse, where the defendant argues that he or she committed the prohibited act because he or she was faced with an urgent and immediate danger which could not be avoided by obeying the law.

Negligence - A failure to exercise reasonable care in the circumstances presented to the defendant. Negligence measures a defendant's conduct on the basis of an objective standard, regardless of the defendant's subjective mental state. Thus, a defendant acts negligently where he or she does not do what he or she should.

Objective - Actual conduct, objects, or conditions which have an existence independent of one's interpretation of them. An objective fault element does not require the trial justice to consider the defendant's internal mental state at the time that the prohibited act was committed. Rather, the defendant's conduct is contrasted with what the reasonable person would have known or done in the same circumstances.

Officially induced error - A defence, where the defendant argues that he or she was led to believe by the erroneous advice of an official that he or she was not acting illegally.

Omission - An intentional or unintentional failure to do something that one has a duty to do, or that a reasonable person would do.

Onus - The burden or responsibility to prove something.

Open Question - A question which does not suggest the answer to the witness.

e.g. **Q:** And when you were stopped at the intersection, what did you see?

A: I saw the defendant's vehicle enter the intersection while the light was red.

As opposed to:

Q: Did you see the defendant enter the intersection on a red light?

A: Yes/No.

Order - A written command or direction from the court, which determines some point or directs some steps in a proceeding. An order is distinguished from the judgment, the latter being the final determination of the matter in dispute in the proceedings. Examples of orders include an order excluding witnesses, an order to appoint an interpreter, or an order to produce certain evidence.

Per se - By, through, or in itself. Something, which through its own nature, standing alone, is proof of the matter asserted.

Presumption of Innocence - The constitutional requirement that the prosecution prove the defendant's guilt beyond a reasonable doubt. This necessitates that the prosecution not only proves all the elements of the offence, but also the nonavailability of any applicable defences.

Prima facie – “At first sight” or “on the face of it”. Proof or evidence, which is sufficient to establish the fact or allegation asserted, unless contradicted by evidence adduced by the other party. Evidence which is sufficient to sustain a judgment in favour of the party adducing the evidence, but which may be contradicted by other evidence. In *ex parte* proceedings, the Crown has the obligation to establish a *prima facie* case.

Recognizance - An obligation entered into by the defendant before the justice to appear in court on a certain day or to keep the peace.

Record - A document which lists the crimes or offences that a defendant has been previously convicted of.

Regina - The “Queen” (or “King”). All offences theoretically are committed against her majesty (or his majesty, Rex), and are prosecuted on behalf of the Monarchy by the Attorney General.

Regulatory Offence - An offence enacted by statute or legislation aimed primarily at regulating risky behaviour that may cause harm.

Remedy - The means by which a right is enforced, or the violation of a right is prevented, redressed or compensated.

Sine die – “Without a day being fixed”. Putting a matter over or adjourning without assigning a day for a further hearing.

Stay of Proceedings - A disposition where the Court does not allow a prosecution to proceed. This remedy may be granted by the Court in response to objectionable police or prosecutorial conduct or a violation of a defendant's constitutional rights.

Strict Liability - Liability for negligence. As is the case with absolute liability offences, the Crown need only prove the *actus reus* i.e, the doing of the prohibited act is *prima facie* evidence of guilt. Proof of *mens rea* is not required. However, unlike absolute liability offences, an accused can escape liability if he or she can prove that he or she exercised

reasonable care: *R v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1326, 40 C.C.C. (2d) 353.

Subjective - One's internal perception of external, independent objects or conduct. A subjective fault element requires the justice to consider what the defendant was actually thinking at the time that the prohibited act was committed.

Summons - A document issued by the court commanding a person to attend court as a witness, or produce documents or other evidence.

Suspended Sentence - A disposition where the justice "suspends" the passing of sentence following conviction. This is not the same as an acquittal; a finding of guilt is registered. Additionally the justice only has jurisdiction to suspend sentence with respect to the fine or possible imprisonment that may have been imposed. The justice does not have jurisdiction to suspend or reduce the amount of demerit points which are imposed on a defendant convicted of traffic offences.

Trial *de novo* - A "fresh" or new trial. The second trial of a matter pursuant to an order of a higher court as if the first trial had not been held and the previous decision had not been rendered.

9.2 Reference Sources

The following materials were referred to while compiling the list of definitions contained in this chapter. The reader is advised to refer to these materials in addition to the "Definition" section of any relevant act. The "Definition" section is ordinarily the first section of an Act, or the first section of the relevant part of an Act.

A Concise Dictionary of Law 2d ed. (New York: Oxford, 1990).

Bird, R. *Osborn's Concise Law Dictionary* 7th ed. (London: Sweet & Maxwell, 1983).

Black, H.M. *Black's Law Dictionary* 6th ed. (St. Paul, Minn.: West 1990).

Burton, W.C. *Legal Thesaurus* 2d ed. (Toronto: Maxwell MacMillan 1992).

Dukelow & Nuse *The Dictionary of Canadian Law* 2d ed. (Scarborough: Carswell 1995).

Words & Phrases Cheryl Finch ed. (Scarborough: Carswell 1~3).

Words & Phrases: Permanent Edition (St. Paul, Minn.: West 1964).

Words & Phrases Legally Defined John B. Saunders ed. 3d ed. (London: Butterworths 1990).

10. INDEX

- Absolute liability,
 - constitutional validity, 61
 - defence to, 62
 - fundamental justice, 59
 - offences, 57, 58, 60, 61
- Acquittal/appeals from, 253-255
- Actus reus*, 96, 97, 296
- Adjournments
 - generally, 85
 - practice following, 93
 - request by defence
 - as remedy to non-disclosure, 274
 - due to prejudice, 170
 - to permit arrival of documents, 92-93
 - to permit attendance
 - of defendant, 88
 - of defendant's agent or counsel, 87
 - of prosecutor, 91-92
 - of Provincial offences officer, 90
 - of witnesses, 88-90
- Admission
 - by conduct, 126
 - formal, 112-113
 - informal, 112-113, 116
 - of evidence, 94-96
 - of fact, 112-113
 - through silence, 126-127
- Adversarial system
 - parties, 45
- Adverse witness, 179-180
- Agent
 - role at trial, 46-47
 - role of, at arraignment, 74
- Alibi evidence, 193

Appeal

based on defects in certificate of offence, 258-259

Appeal

commencing, 242

conduct by review, 244-246

costs

as remedy to *Charter* breach, 257

to defendant appellant, 257

Crown, request for, 263

dismissal of, as abandoned, 259-260

failure to provide reasons, 250-251

from conviction, 248-250

from sentence, 255-257

general provisions, 229-231

grounds for, 240-242, 261-263

motion to extend time for, 242-244

notice of, 242

payment of fine before, 232

powers of the court, 246-248

stay of fine pending, 234-235

to Ontario Court of Appeal, 261

transcripts, 244

transmittal of relevant material, 237-238

under Part I, 238, 239

unreasonable verdict, 250

Application, at trial

applicant, 67

evidentiary requirements, 67-68

moving party, 67-68

procedural requirements, 68-69

Arraignment

defendant's options at, 74-75

process, 74

purpose of, 74

role of defendant at, 74

role of prosecutor at, 74-75

Autrefois acquit, 80-82

Autrefois convict, 80-82

Balance of probabilities, 102

- Best evidence rule, 115
- Bilingual hearings
 - duty of prosecutor, 289-290
 - notice to parties, 287
 - requests for, 286
 - rules for proceedings
 - in designated areas, 288-289
 - in non-designated areas, 289
 - time limit on request, 287
- Burden of proof
 - admission of evidence, 98-99
 - evidential, 98-99
 - on defendant, 98
 - on prosecutor, 97-98
- Calling the list, 67
- Certificate of offence, 4-5
 - appeal based on defects in, 238-240
 - limitation period, 72
 - motion to quash, 69-70
- Certificate of Parking Infraction, 4
- Challenge to certificate of offence, 69-70
- Charge Screening, 28-30, 65
 - at First Attendance Meeting, 39
 - existence of prima facie case, 28
 - role of prosecutor, 27
- Charter right
 - enforcement of, 266
 - forum for exercising, 267
 - of defendant, 269, 277
 - presumption of innocence, 59-60, 105-106
 - protection of interests, 278
 - reasonable limit, 106-107
 - to timely trial, 277
- Circumstantial evidence, 109-112
- Collateral fact rule, 182-183
- Compelling appearance
 - of defendant, 64-65
 - of witness, 63-64
- Confession rule

- principles of, 134-135
- conditions of, 134-135

Constitutional validity

- absolute liability, 60-61
- default conviction, 12
- section 9 and 9(1), 13-14
- strict liability, 58-59

Conviction

- reasonable prospect of, 28-29

Corbett application, 185-186

Counsel

- Defence,

 - role at trial, 46-48

- Crown

 - role at trial, 45-46

 - role of, at arraignment, 74-75

Credibility

- of defendant on appeal, 251-252

- of expert witness, 154-155

- of witness, 184

- reasonable doubt, 99-101

Cross-examination

- credibility of witness, 184

- form and limits of questioning, 181-184

- on document used to refresh memory, 176-177

- procedure for inconsistent statements, 187-188

- scope under section 23, 179-180

Crown counsel

- role at trial, 45-46

- role of, at arraignment, 74

De Minimis Non Curat Lex, 204

Declarations

- against pecuniary or proprietary interest, 127

- against penal interest, 127-128

- dying declarations, 129

- made in the course of normal business or duty, 129-131

Default conviction

- process, 12

 - constitutional validity, 14-19

- reopening
 - defendant's options, 19-20
 - motion to reopen, 19-20
 - test for, 21-22
- section 9, 14-19
- Defence counsel
 - role at trial, 46-47
- Defences
 - De Minimus Non Curat Lex*, 204
 - excuses or justifications, 200
 - ignorance of the law, 202
 - necessity
 - specific applications, 201
 - officially induced error, 203-204
- Defendant
 - ability to pay fine, 211-212
 - arraignment, 74
 - at First Attendance Meeting, 37-39
 - effect of delay of trial on, 283
 - fault, *mens rea*, 56-57
 - hearsay evidence, 116
 - identification of, 145-146
 - in custody, 231-232
 - interests of, 26
 - objective fault, 62
 - options following reopening, 22-23
 - options when served with Offence Notice
 - plea of guilty by paying set fine, 6
 - plea of guilty with representations, 6-8
 - trial, 8-9
 - prior convictions, 185-186
 - remedies for non-disclosure
 - at trial, 274-275
 - generally, 273-274
 - on appeal, 275-277
 - reopenings, 197-199
 - rights
 - to full disclosure, 272
 - to fair trial, 278

- to surrebuttal, 194-195
- under the *Charter*, 272, 277-278
- role in trial process, 43
- sentencing
 - mitigating factors, 211-217
- statements by, 133-134
- subjective fault, 62-63
- submissions, 220-222, 222-223
- unrepresented
 - rights to disclosure, 33, 272
- Delay of trial
 - due to actions of defendant, 281-282
 - length of, 279-280
 - prejudice to defendant, 283-284
 - reasons for, 281
 - systematic or institutional, 282-283
 - unreasonable delay
 - remedy for, 284
 - test for, 278-279
- Demerit points, 235
- Deterrence
 - sentencing, 207-208
- Disclosure, 30-34
 - availability to unrepresented defendant, 33, 269-271
 - defendant's right to, 30-31, 272
 - duty of police, 271
 - duty of prosecutor, 31-32, 269-271
- Dismissal of appeal, 259-260
- Docket
 - organizing of, 65-67
- Efficient use of judicial resources, 27
- Enforcement
 - of *Charter* rights, 266
- Evidence
 - admissibility
 - generally, 94
 - materiality, 95-96
 - relevance, 95
 - best evidence rule, 115

- Documentary, 115
- eyewitness testimony, 143-144
- hearsay, 116-117
- novel scientific, 155
- opinion, 151, 163-164
- real
 - photographs, 114, 146-147
 - videotapes, 114, 146-147
- value of prior inconsistent statement, 122-124
- Examination-in-chief, 174-175
- Exclamations
 - spontaneous
 - state of mind or present intentions, 132-133
 - statements of bodily feelings and condition, 131
- Exclusionary rule
 - opinion evidence, 151-153
 - privilege, 165-166
- Expert witness *see* Opinion evidence
 - absence of exclusionary rule, 151-153
 - admissibility of, 151-152
 - authoritative texts, case studies or reports, 158-159
 - credibility, 162-163
 - cross-examination techniques, 159-161
 - hearsay, 156-157
 - hypothetical questions, 157-158
 - limit on number, 161-162
 - qualifications of, 154-155
- Eyewitness identification, 143-144
- Failure to appear at trial, 13-14
- Failure to Respond to Offence Notice, 12-13
- False presumptions, 103-104
- Fault
 - subjective vs. objective, 62-63
- Fine
 - payment before appeal, 232
 - statutory minimum, 226-227
- First Attendance Meeting
 - availability of, 37-39
 - charge screening, 39

- matters to avoid, 40
- plea of guilty at, 40
- principles of, 39
- process of, 37-39
- resolution discussions at, 39
- First Attendance Notice, 37-39
- French language services rights, 286
- Fundamental justice
 - absolute liability, 60-61
 - strict liability, 58-59
- Grounds for appeal, 240-242
- Guilty plea
 - as mitigating factor, 221-222
 - at First Attendance Meeting, 40
 - defendant's options
 - when served with offence notice, 5, 6-9
 - with representations, 6-8, 22
 - sentencing following, 79-80, 215-216, 221-222
 - to offence charged, 74-75
 - to substituted offence, 78-79
- Hearsay, 116-133
 - admission of, 125
 - evidence adduced, 117-118
 - exceptions, 119
 - admissions by conduct, 126
 - admissions through silence, 126
 - implied assertions, 118-119
 - K.G.B. Application*, 122-125
 - necessity and reliability of, 119-122
- Hostile witness *see* Adverse witness
- Identity
 - established with eyewitness testimony, 143-144
 - established with videotape and/or photographic evidence, 146-147
 - proof of in absence of direct evidence, 145-146
- Ignorance of the law, 202-203
- Impounded motor vehicles, 236-237
- In custody defendants, 231-232
- Interpreter
 - conduct at trial, 172-173

- witness' right to have, 171-172
- Irrebuttable presumptions, 104-105
- Issue Estoppel*, 82-83
- Joint submissions, 222-223
- Judicial discretion
 - sentencing, 206
- Judicial jurisdiction, 72
- Judicial notice
 - evidential use of facts or matters noticed, 150-151
 - of fact, 147-149
 - of laws, 149-150
- Judicial resources
 - efficient use of, 27
- Jurisdiction
 - for *Charter* relief, 267-268
 - judicial, 72
 - territorial, 70-72
- Justice
 - trial
 - controlling cross-examination, 50-52
 - discretion/competence
 - agents, 48
 - duty to ask questions, 52-53
 - duty to assist unrepresented defendant, 55-56
 - judicial notice, 147-151
 - role of, 49
 - sentencing
 - discretion of, 223, 226-227
 - duty of, 211, 220-223
- K.G.B. Application*, 124-125
- Kienapple Principle*, 83-84
- Lay witness, 163-164
- Laying of an information, 4
- Leading questions, 181
- Liability
 - absolute, 57-58, 60-62
 - strict, 57-60, 211
- Licence suspensions, 235-236

Limitation period

Certificate of Offence, 72

Mens rea, 56, 57, 58, 62, 97, 98, 211

Minister of justice

prosecutor's role as, 26

Mistake of fact, 62

Mitigating circumstances, 216-217

driving offences, 217

Motion

evidentiary requirements, 68-69

for non-suit, 44, 189-190

for stay, pending appeal, 233-235

notice of, 69

procedural requirements, 68-69

to extend time to appeal, 242

to quash certificate of offence, 13-14, 69-70

to reopen hearing, 21

Moving Party, 67

Necessity defence, 200

Non-disclosure

due to overriding public interest, 31

duty of prosecutor, 31-32

on grounds of privilege, 31, 165

Non-suit

motion for, at trial, 44, 189-190

Notice

First Attendance, 37-38

Intention to Appear, 8-10, 24, 39

to challenge to officer's evidence, 10

judicial, 147-150

of abandonment, 259-260

of appeal, 242

of motion

form and consent, 69

of offence *see* Offence notice

of parking infraction, 4

of trial, 9-10

Novel scientific evidence, 155

Objective fault, 62-63

- Offence notice, 4, 5
 - defendant's options when served, 5-9
 - failure to respond to, 12-13
 - limitation period, 72
 - process, 5
- Offence
 - certificate of, 4
 - motion to quash, 13-14, 69-70
 - limitation period, 72
 - HTA, 224-225, 236-237
 - Non-HTA, 224
 - notice of, 4-5
 - regulatory, 206-207
 - absolute liability, 60-61
 - nature of, 57
 - strict liability, 58-59
- Officially induced error, 203-204
- Ontario Court of Appeal
 - grounds for appeal to, 261-263
- Open-ended questioning, 175-176
- Opinion evidence *see* Expert witness
- Order of dismissal, 84
- Order, probation, 235
- Organizing the docket, 65-67
- Parking Infraction
 - certificate of, 4
 - notice, 4
- Part 1 summons, 11
- Parties
 - adversarial system, 45
- Past recollection recorded, 178
- Penal interest
 - declarations made against, 127
- Permissive presumptions, 103-104
- Photographs
 - admissible as evidence, 114
 - used to establish identity, 146-147
- Plea Bargaining *see* Resolution discussions

Plea

guilty

- at First Attendance Meeting, 40
- defendant's options, 6, 7, 8, 9
- sentencing following, 78-79, 215-216, 221-222
- to offence charged, 74
- to substituted offence, 78

special

- autrefois acquit*, 80-82
- autrefois convict*, 80-82
- issue estoppel*, 82
- keinapple principle, 83-84
- res judicata*, 82

Police

- duty to disclose, 271

Powers of the court on appeal, 246-257

Presumption

false

- irrebuttable, 104
- permissive, 103-104
- without basic fact, 103
- of innocence, 59-60, 103
- true, 104-105

Pre-trial matters

- conduct of prosecutor, 25
- process, 25
- victim(s) interests, 26

Prior convictions, 184

Prior inconsistent statements, 122-124, 180, 186-189

Privilege, 165-166

Probation orders, 235

Proof of identity in absence of direct evidence, 145-146

Prosecution brief

- contents, 65-67
- review of, 65-67

Prosecution

- discontinued, 30
- public interest to continue, 29-30

Prosecutor

- at appeal, 263-264
- at arraignment, 74
- burden of proof, 57
- charge screening, 27
- conduct, pre-trial matters, 25
- discretion to call witness(es), 168-170
- discretion to delay disclosure, 273
- duty at bilingual hearings, 289-290
- duty to conduct fair trial, 269, 275
- duty to disclose, 269-271
- First Attendance Meeting
 - matters to avoid, 40
- municipal, role of, 45-46
- resolution discussions
 - principles, 34-36
- right to reply, 190-195
- role as minister of justice, 27
 - duty to disclose, 31, 32
 - non-disclosure, 32
- role in trial process, 45-46

Proceedings

- Arraignment, 43
- Bilingual hearings, 286-290
- Charge screening, 28-30
- Default conviction, 12-19
- First Attendance Meetings, 37
- Reopening
 - default conviction, 21-22
 - trial, 195-196
- Resolution discussions, 34-36
- stay of, 277
- trial, 45-49

Protection of the public, 26

Public interest

- impact on disclosure, 31
- protection of, 26
- to continue prosecution, 29-30

Quash

- motion to, 67, 69

Question of law, 252

Questioning

- adverse witnesses, 178-180
- form and limits on cross-examination, 181-184
- leading questions, 175-176, 181
- open-ended, 175-176
- refreshing memory, 176-179
- relevance, 181
- suggestions, 182

Reasonable doubt, 99-102

Reasonable prospect of conviction, 28

Re-examination, 189

Refreshing memory of witness, 176-177

Regulatory offences

- nature of, 57

Reopening

- default conviction, 21-23
- trial, 195-196

Reply evidence, 190-195

Reply to alibi evidence, 193

Request for Bilingual hearing, 286-287

Request for Crown appeals, 263

Res Gestae see Spontaneous Exclamations*Res Judicata*, 82

Resolution discussions

- First Attendance Meeting, 39
- principles of, 39
- process, 39-41

Review

- conduct of appeal, 244-246

Right to reply, 190-195

Screening a charge, 27

Screening a charge

- existence of *prima facie* case, 28

Section 23, 179

- scope of cross-examination under, 180

Section 9 and 9(1)

- constitutional validity, 14-19
- default conviction, 14-19

Sentencing

- disparity, 217-218
- guilty plea, 221-222
- hearing for, 220
- objectives of, 207-211
- principles of, 211-271
- proof of previous convictions, 224-225
- proportionality, 211
- submissions, 222-223
- totality principle, 218-219

Sentencing justice

- discretion of, 206
- role of, 206, 211

Shephard test, 189-190Spontaneous exclamations *see Res Gestae*, 131

Standard of proof

- balance of probabilities, 102
- beyond reasonable doubt, 99-102

Statements

- admissibility, 133-134
- components of confession rule, 134-135
- language comprehension, 138
- made under compulsion of statute, 139
- of bodily feelings and condition, 131
- prior inconsistent statements, 186-189, 194
- reduced to writing, 187
- voluntariness, 133-143
- voluntary
 - permissible use by prosecutor, 141-142

Stay of fine pending appeal, 234-235

Stay of proceedings, 284

Strict liability, 58-59, 210-211

- constitutional validity, 63
- fundamental justice, 59
- presumption of innocence, 59

Subjective fault, 62

Submissions, 220-221

Summons

defendant's options, 11

failure to comply, 64

Surrebuttal, 194-195

Territorial jurisdiction, 70

Test for unreasonable delay, 278-284

Totality principle, 218-219

Transcripts, 244, 260

Trial

role of justice, 49-50

arraignment, 45-46

calling evidence, 46-49

Charter right to timely trial, 277-278

compelling appearance of defendant, 63-64

defendant's options

when served with offence notice, 5-6

delay of

due to actions of defendant, 281-282

length of, 279-280

prejudice to defendant, 283

reasons for, 281-283

systematic or institutional, 282-283

failure to appear, 13-14

justice

discretion of, 49-50, 53-55

duty to ask questions, 52-53

duty to assist unrepresented defendant, 55-56

judicial notice, 147-151

role of, 49-56

notice of intention to appear, 8-10

parties, 45

process,

victim's role, 26

reopening

by defendant, 197-199

by prosecutor, 195-195

role of agent, 46, 48-49

role of defence counsel, 47-48

- test for unreasonable delay, 278-284
- True presumptions, 104-105
- Ultimate issue rule, 162-163
- Victim(s) interests
 - pre-trial matters, 26
- Videotapes
 - admissible as evidence, 114-115
 - to establish identity, 146-147
- Voir Dire*, 43, 107-108, 124-125, 139-141, 166, 179
 - establishing qualification of expert witness, 154-155
 - claim for privilege, 165-166
- Voluntary statements
 - permissible use by prosecutor, 141-142
- Warrant
 - issuance of, 64
- Wigmore* test, 165
- Witness
 - adverse, 179
 - at trial, 166-170
 - compelling appearance of, 63-64
 - compelling testimony of, 167-168
 - competence of, 166-167
 - contact with
 - by party calling, 173
 - by party opposed, 174
 - credibility, 184-189
 - establishing need for interpreter, 172
 - exclusion of, 173-174
 - expert, 163-164
 - eyewitness testimony, 154-155
 - lay witness, 163-165
 - prosecutorial discretion to call, 168-170
 - right to interpreter, 171-172

